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IN THE

Supreme Court of the United States.

October Term, 1924.—No. 661.

PENNSYLVANIA RAILROAD SYSTEM AND ALLIED LINES FEDERATION NO. 90, EXECUTIVE COUNCIL OF PENNSYLVANIA RAILROAD SYSTEM AND ALLIED LINES FEDERATION NO. 90, and N. PLUMMER GOOD, individually and as President of Pennsylvania Railroad System and Allied Lines Federation No. 90 and member of the Executive Council thereof, H. A. BIXLER, individually and as Secretary-Treasurer of Pennsylvania Railroad System and Allied Lines Federation No. 90 and member of the Executive Council thereof, CHARLES KUTZ, WALTER P. WELLER, RAYMOND J. DORSON, ARTHUR C. MYER, GEORGE W. WOOMER and ALFRED J. BURGER, individually and as members of the Executive Council of Pennsylvania Railroad System and Allied Lines Federation No. 90, ROME LA FONTAIN, HENRY ROTHERMILL, GEORGE CRAMER, JACOB KERN and F. M. KEECH,

Complainants and Appellants,

—against—

THE PENNSYLVANIA RAILROAD COMPANY, SAMUEL REA, W. W. ATTERBURY, ELISHA LEE, GEORGE L. PECK, E. T. WHITER, C. S. KRICK, M. W. CLEMENT, T. B. HAMILTON, BENJAMIN McKEEN, I. W. GEER, P. F. SMITH, JR., T. H. DAVIS, W. J. HILTON, CHARLES MODE, J. E. CAVEY and C. G. LARSON,

Respondents and Appellees.

BRIEF FOR APPELLANTS.

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Respondents and Appellees.

Statement of the Case.

This is an appeal from a decree of the United States Circuit Court of Appeals of the Third District as of March Term, 1924, No. 3118, entered on the 14th day

of July, 1924, which affirmed an order of the District Court of the United States for the Eastern District of Pennsylvania entered in the office of the Clerk of said Court on the 4th day of February, 1924, dismissing the bill of complaint herein and awarding the defendants the costs of the action.

The action was begun by the filing of a bill in equity, and issue was joined by the service and filing of an answer in behalf of all of the defendants. On the trial of the case, after the complainants had presented the proofs, the defendants moved to dismiss the bill as to all of the defendants, which motion was granted and a decree entered thereon.

The bill alleges that the defendants are engaged in a conspiracy to violate and that they are violating the provisions of Title III of the Transportation Act of 1920 by refusing to confer with their employees on disputes involving wages and working conditions, and to submit such disputes to the Railroad Labor Board, and prays for a decree enjoining such conspiracy and violation of the law.

The bill also alleges that the defendant Pennsylvania Railroad Company has paid various classes of employees represented by the plaintiffs wages below those established by law and by contract. Such employees seek to recover the difference between the wages paid them and the wages to which they claim to be entitled and ask for an accounting to ascertain such amounts.

The answer denies the alleged conspiracy; denies the alleged duty of carriers to confer with their employees or to submit resulting disputes between them and their

employees to the Railroad Labor Board. It also denies that the employees in whose behalf the suit is brought are or were entitled by law or contract to wages in excess of those paid to them.

The main facts in the case are as follows:

Prior to December 28, 1917, a system of railroads extending over twelve states and the District of Columbia was operated as the Pennsylvania System. The Pennsylvania System employed a large number of men in shop or mechanical work in and about the repair and maintenance of locomotives, cars and other equipments. The said employees were engaged in six different crafts, *i. e.*, machinists, electricians, boiler makers, blacksmiths, sheet metal workers and carmen. Within each of such crafts there was a large national labor union. These labor unions represented a combined membership of about 300,000, many of the members being employed in shop craft work on the Pennsylvania Railroad System. The Company, however, discouraged trade unions among its employees in the shop and mechanical departments and refused to recognize or deal with them, though it did recognize and deal with certain other labor organizations, such as the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors and the Brotherhood of Railway Trainmen.

On December 28, 1917, the President of the United States, under the authority of the Act of Congress of August 29, 1916, took over the railroads of the United States, including the Pennsylvania System, and operated

them through the United States Railroad Administration and the Director General of Railroads. On February 21, 1918, the United States Railroad Administration issued an order, known as General Order No. 8, which prohibited discrimination against employees because of membership or non-membership in labor organizations. In consequence of this order, the local unions and lodges of the national organizations of mechanical and shop craft employees became active, and a large number of the employees on the Pennsylvania System became members of such organizations. By July 1, 1918, the number of local unions, composed of members engaged in shop craft work on the Pennsylvania System had arisen to 170, with a combined membership of about 30,000, a little less than one-half of the entire number of shop craft employees on the System.

On the 8th day of July, 1918, a convention was held in Altoona, composed of 171 delegates, representing all local lodges or unions of shop craft workers employed on the Pennsylvania System. As a result of this convention, there was formed the Pennsylvania Railroad System and Allied Lines Federation No. 90, one of the complainants in the bill. The preamble and the platform of the convention set forth the purposes for which the Federation was formed, such purposes being mainly the procurement of a minimum wage and the improvement of working conditions in the shops. At the same time, a constitution and by-laws were adopted, which provided that the business of the Federation should be managed by a president and a secretary-treasurer and an executive council, which consisted of these two officers

and six other members, *i. e.*, the respective chairmen of the six affiliated crafts composing the Federation. Among other things, the constitution and by-laws contained provisions against strikes by employees in any of the crafts, unless authorized by the Federation on a referendum vote of the membership and sanctioned by the Railway Employees' Department of the American Federation of Labor, with which System Federation No. 90 and its component crafts were affiliated.

Provision was also made for the maintenance of the organization by the payment of five cents per month for each member of the Federation as a capita tax or dues. By the beginning of the year 1921, Federation No. 90, composed exclusively of employees engaged in shop craft work on the Pennsylvania Railroad System, had a membership exceeding 60,000, almost 90% of the total number of shop craft employees on the System. The authorized representatives of Federation No. 90, ever since its organization, negotiated for and on behalf of its members with the United States Railroad Administration and with the Pennsylvania Railroad Company after Federal control of the railroads ceased up to and including May 24, 1921. It was recognized as the authorized spokesman of the shop craft employees of the Pennsylvania Railroad Company by the Railroad Labor Board.

System Federation No. 90 was, as just detailed, organized about July 11, 1918. Prior to that time, on the 25th of May, 1918, the United States Railroad Administration issued General Order No. 27 revising and increasing the prevailing rate of wages of shop craft employees and fixing uniform rates of wages for them

throughout the country. On the 25th of July, 1918, Supplement No. 4 to General Order No. 27 was issued, establishing definite and uniform classification of shop craft employees on the railroads under Federal control. In December, 1918, as the result of the numerous complaints of shop craft employees, the United States Railroad Administration ordered a vote to be taken among them on the question of continuing the system of "piece work." About 98% of all the employees expressed their opposition to piece work, which was thereupon discontinued by the Railroad Administration in February, 1919.

Thereafter, the United States Railroad Administration entered into an agreement, in writing, with the employees represented by the Railway Employees' Department of the American Federation of Labor and its affiliated organizations of the Mechanical Section (including System Federation No. 90). This agreement, which is commonly known as the "National Agreement" and became effective on October 20, 1919, granted the employees a wage increase of four cents per hour and continued in force the classification of employees in shop craft work. The agreement provided that eight hours should constitute a day's work and that all employees should be paid on an hourly basis. It contained provisions for adjusting the grievances of employees and protected them against arbitrary dismissals. The National Agreement specifically recognized the right of Labor Organizations to represent their members in dealings with the carriers and expressly stipulated that the carrier would not discriminate against any committee-

men who represented their employees. It also definitely established and defined the "seniority rights" of the employees. The National Agreement and the orders of the United States Railroad Administration, which have been referred to, were applicable to the Pennsylvania Railroad System from their respective dates and were all in full force on the 28th day of February, 1920, when the Transportation Act became a law.

About February 1, 1920, and prior to the enactment of the Transportation Act, the shop craft employees, as well as other classes of railroad employees, presented to the United States Railroad Administration a request for wage increases and for certain modifications of the National Agreement concerning working conditions. The request was so presented by the recognized labor unions, including System Federation No. 90. No action was taken, but the President of the United States assured the representatives of railroad workers' organizations that the Administration would use its influence for the establishment of appropriate legal machinery to pass upon the requests and to deal in the future with all questions and disputes between carriers and their employees.

On the 23rd of February, 1920, Congress passed what is known as the Transportation Act, which was signed by the President of the United States, and became a law on February 28, 1920. Under the terms of this Act, Federal control of the railroad terminated on March 1, 1920, and on that day all of the railroads, including the Pennsylvania Railroad System, were returned to the ownership and operation of their former owners.

Title III of the Transportation Act relating to "Disputes between Carriers and their Employees and Subordinate Officials," directs all carriers and their employees to consider and, if possible, decide in conference all disputes which may lead to an interruption to the operation of the carrier. If such disputes are not decided by such conference, they are to be referred to railroad boards of labor adjustment for hearing and decision, provided they do not involve questions of wages.

The Act also creates a "Railroad Labor Board" composed of nine members, three representing the employees and subordinate officials, three representing the carriers and three constituting "the public group," all appointed by the President.

The Labor Board thus constituted is given jurisdiction of any dispute involving grievances, rules or working conditions in respect to which any Adjustment Board certified to that it had failed, or would fail, to reach a decision within a reasonable time, or in respect of which the Labor Board determined that the Adjustment Board had so failed or was not using diligence. In the event that Adjustment Boards were not organized, the Act under Section 307 (a) provides for the direct jurisdiction of the Labor Board over the disputes in the circumstances mentioned in the Section.

Under Section 307 (b) jurisdiction over wage disputes is directly conferred upon the Labor Board.

The Act provides that decision of the Labor Board should establish wages and standards of conditions deemed by such Board to be just and reasonable. Section 307 (d) defines specifically the elements and fac-

tors to be considered in determining justness and reasonableness.

Section 308 (4) reads: "The Labor Board may make regulations necessary for the efficient execution of the functions vested in it by this Title (*i. e.*, Title III)."

For the convenience of the Court the entire text of Title III of the Transportation Act is reprinted on page of this brief.

No Adjustment Boards were ever established upon the Pennsylvania Railroad System.

With his signing of the Transportation Act, the President of the United States addressed a letter to the executive officers of the principal organizations of railroad workers in the United States, including the Chairman of the Railway Employees' Department of the American Federation of Labor (of which System Federation No. 90 was a part). This letter is contained in the record (Record, pp. 29 and 30). Its purport was to inform the representatives of the Labor Organizations why the President had not acted upon their pending claim for wage increase and to assure them that the Transportation Act (by Title III) had provided a method which would secure a careful and just consideration of the interests of both carriers and employees, and a proper determination of any controversy between them. The letter expressly stated that "Section 301 of the Bill evidently contemplates that the carriers and employees should, as suggested by you (*i. e.*, the representatives of the labor organizations) select representatives, who will thus constitute a bi-partisan board for the purpose of

atttempting by conference to agree upon a solution of this wage problem."

Immediately upon the appointment of the Railroad Labor Board (about April 15, 1920) it took charge of the disputes as to wages and working conditions which were then pending. Hearings were had before the Board, in which both the carriers and the organizations of employees participated; and on the 20th of July, 1920, the Labor Board rendered what is known as Decision No. 2. This decision awarded to the employees of the railroads engaged in shop and mechanical work, including those employed on the Pennsylvania Railroad, an increase in wages of 13 cents per hour. Subsequently, on the first day of June, 1921, the Labor Board by its Decision No. 147, reduced the wages of such employees by eight cents an hour. Both Decision No. 2 and Decision No. 147 were fully accepted by the railroads and their employees engaged in shop craft work, including the Pennsylvania Railroad Company, System Federation No. 90, and the members thereof.

At the time Decision No. 2 was rendered, there were also pending before the Railroad Labor Board disputes involving rules and working conditions. Concerning these, the Labor Board found that their investigation and consideration demanded more time. The Board, therefore, did not then decide them but did declare that as the basis of Decision No. 2 it assumed the continuance in full force and effect of the rules and working conditions in force under the authority of the United States Railroad Administration and that pending a determination no changes should be made therein except by agree-

ment between the carrier and the employees concerned. It also announced that further hearings would be held on these disputes.

In August, 1920, N. P. Good, one of the complanants in this case and President of System Federation No. 90, telegraphed to the general managers of the different regions of the Pennsylvania Railroad System to the effect that he had been informed that it was the intention of the Pennsylvania Railroad to introduce a piece work, premium or bonus system on September 1, 1920. He asserted that such action would be in violation of the National Agreement and of Decision No. 2, and requested the General Managers to advise him whether their intention was as reported.

On September 1, 1920, Mr. Good received replies from the various managers, uniform in tenor, the purport of which was that the railroad representatives had advised the Labor Board that the railroads would comply with the decision of the Board in regard to working conditions pending a hearing; that Decision No. 2 provided that pending the presentation of the questions involved in the dispute, no changes should be made except by agreement between the carriers and employees concerned. The replies ended as follows: "We do not contemplate any change pending the decision of the United States Railroad Labor Board, unless in the meantime, our officers, *and such employees as may be concerned* may, by agreement, desire to do so."

In December, 1920, the Labor Board took up the consideration of the undecided portion of the dispute referred to in Decision No. 2, and on the 14th day of

April, 1921, it published and promulgated Decision No. 119. This decision declared that the compliance, by both carriers and employees, with Section 301 of the Transportation Act had been perfunctory and called upon both sides to make *bona fide* efforts to compose their disputes in conference.

The main features of Decision No. 119 were substantially as follows:

1. It declared that the rules, working conditions and agreements in force under the authority of the United States Railroad Administration would cease and determine on July 1, 1921.

2. It called upon the officers and *System Organizations of employees* of each carrier to designate and authorize representatives to confer and decide as much of the dispute as was possible.

3. It reserves the right to terminate the existing working rules prior to July 1, 1921, if it should appear that any class of employees was unduly delaying negotiations. It also reserved the right to continue the status beyond July 1, 1921, if delay was caused by the carriers.

4. It provided that the rules governing such conferences, should be consistent with the principles set forth in "Exhibit B" attached to the decision.

Exhibit B is set forth in full in the record (Record, pp. 45 to 48).

Attention is particularly called to "Principles 7 and 15," which are as follows:

> "7. The right of employees to be consulted prior to a decision of the management adversely affecting their wages or working conditions shall be agreed to by the management. The right of participation shall be deemed adequately complied with, if and when the representatives of *a majority of the employees of each of the several classes directly affected* shall have conferred with the management."
>
> "15. The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. *Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class.* No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice."

In 1920, there were actually engaged in shop craft work on the Pennsylvania Railroad about 70,000 men and the membership of System Federation No. 90 was about 63,000. In the early part of 1920, the Pennsylvania Railroad had laid off or furloughed very nearly 50% of its shop craft employees on account of the business depression existing at that time.

The learned Circuit Court of Appeals entirely misapprehends the nature and status of the Company's em-

ployees so laid off or furloughed and all through its opinion refers to them as "employees on strike." The furloughed employees of the Company were not on strike but were temporarily "laid off" by the Company in pursuit of its policy to decrease its operating forces during the period or seasons of business depression. Such furloughed workers retained their status as employees of the Company under an agreement that they would be re-employed in the order of their seniority in service as soon as the Company would again increase its working forces.

This misapprehension on the part of the Court leads it to erroneous conclusions of a serious character, when it states in its opinion that the members of System Federation No. 90 who voted on the latter's ballots for the choice of representatives as hereinafter set forth, embraced "men at work and men on strike" and later in the opinion when the learned Court assumes that the complainants base one of their claims herein on the alleged refusal of the Company to re-employ "furloughed employees, that is, employees on strike" unless they waived certain rights under the Transportation Act.

It must be borne in mind that after the termination of Federal control, and prior to the 24th day of May, 1921, the Pennsylvania Railroad Company had, on several occasions, called in the aid of System Federation No. 90 to settle local disputes with its shop craft employees (Record, p. 133 *et seq.*). It must be also borne in mind that in all disputes pending between the Pennsylvania Railroad Company and its shop craft employees prior to May 24, 1921, the shop craft employees had been repre-

sented by System Federation No. 90, and that when those disputes were carried to the Railroad Labor Board, the position of the shop craft employees had been presented by System Federation No. 90 as their representatives.

On the 24th day of May, 1921, a meeting was held at the office of the Pennsylvania Railroad Company in Philadelphia. There were present at this meeting R. V. Massey, Asst. Gen. Manager of the Eastern Region of the Pennsylvania Railroad; a large number of other officials of the Pennsylvania Railroad and N. P. Good, President—System Federation No. 90, and six chairmen of the respective shop craft organizations which composed the Executive Committee of System Federation No. 90. The representatives of System Federation No. 90 had appeared for the purpose of discussing the pending disputes between the Railroad Company and its employees in accordance with Decision No. 119 of the Railroad Labor Board. They were told by the railroad officials that the railroad did not know whether System Federation No. 90 represented a majority of the shop craft employees and were also informed that the Company would deal with an organization of the shop craft employees only through representatives actually in the employ of the Pennsylvania Railroad Company and at work at the time.

The railroad officials exhibited to the representatives of System Federation No. 90, a draft form of a proposed ballot which it intended to submit to its shop craft employees for the selection of such representatives. It appeared from this ballot that the Railroad Company

proposed to divide the shop craft employees into 276 separate committees, *i. e.*, 6 craft committees within each of 46 "Superintendents' Divisions," the employees in each case being called upon to select their own representatives whose number was arbitrarily fixed by the Company at three. It also appeared that under the railroad's plan the employees who had been temporarily laid off on account of depression were not to be permitted to vote but that the voting was to be confined to those actually at work at the time of the election. The form of the ballot presented by the Company's representatives and the entire minutes of this meeting of May 24th are contained in the record (Plaintiff's Exhibit No. 3, Record, pp. 307 to 402). The ballot also prescribes a number of rules with respect to the form, framework and functions of a new organization of employees which was to issue from such election. Ballots when cast were to be returned to the Superintendent of the Company.

The representatives of System Federation No. 90 maintained that the proposed ballot was in violation of Decision No. 119, and that all elections of representatives of employees should be conducted by the employees themselves and not by the employer. They requested that the Company should either modify the proposed ballot so as to permit the employees to vote for an organization, or delay taking a ballot and submit the question of the method of choosing representatives to the Railroad Labor Board. The Company refused all requests of System Federation No. 90, which thereupon instructed

its members to disregard the ballot submitted by the Pennsylvania Railroad.

Notwithstanding the protest of System Federation No. 90, the Company proceeded to submit its ballot, upon which only men actually at work were permitted to vote.

Out of a total of 33,000 employees, eligible to vote, according to the Company's rule of eligibility, only 5,236 exercised such right. Of this number 742 cast blank ballots; 760 named System Federation No. 90 as representative, while only 3,480 ballots designated individual employees as required by the rules of the Company. System Federation No. 90 also submitted a ballot to its members, both those who were at work and those who were temporarily laid off. On this ballot 37,245 employees of the Pennsylvania Railroad cast their votes. All but seven of these votes were cast for System Federation No. 90 as the representatives of the shop craft employees. This vote of its shop craft employees was disregarded by the Railroad Company.

In the Southwestern Region, established by the Company, the employees designated as representatives on the Company's ballot, informed the Company that they would not act as such representatives, as the use of their name was unauthorized and that they recognized System Federation No. 90 as the duly authorized representative. Nevertheless, the railroad proceeded to establish rules, regulations and working conditions for the employees in this region and promulgated an "agreement," which was not signed by any representative of the employees.

As part of the scheme which was presented by the

Railroad Company at the meeting on May 24th, 1921, it proceeded to establish local Craft Committees, Division Committees and a Regional General Committee. The full details of this organization are contained in the testimony of Robert V. Massey, Gen. Mgr.—Eastern Division, Pennsylvania Railroad (Record, pp. 173 to 190).

By-Laws were adopted by the alleged organizations thus established by the Company which carried out the latter's scheme. The said By-Laws provided for the establishment of "Joint Regional Committees" to be made up of an equal number of officers of the Company and the alleged representatives of the employees, which Joint Regional Committees should be the final tribunal for the decision of controversies. In such Committees the management of the railroad was given equal voting power with the alleged representatives of the employees, and a two-thirds vote was required to make a decision effective.

No machinery was set up for settling disputes in the event that a decision was not reached in accordance with the so-called By-Laws. Mr. Massey testified (Record, p. 181) that if a decision was not reached at a meeting of the Joint Reviewing Committee, as it was termed, a decision had to be reached at the next meeting. If a decision was not then reached an arrangement would be made between the employees and the Company "where it could be arbitrated or something of the kind." No provision was made for a reference to the Railroad Labor Board and the provisions of Title III were entirely ignored.

After the adoption of the By-Laws and the Company's

scheme of organization, the Company met with the persons alleged to constitute the Regional General Committee under such scheme, and such Committee entered into an alleged agreement with the Company fixing the wages, rules, regulations, terms and conditions of work of all the employees engaged in shop craft work on the road. As the result of these agreements, wages were reduced, and rules, regulations, terms and conditions of work substantially inferior to those fixed by the National Agreements and by the Railroad Labor Board were established. All expense of the election and the compensation and expenses of the persons alleged to have been elected by the employees under the railroad's scheme of organization were paid by the Company.

Under the United States Railroad Administration, and also after Federal control of the railroad ceased, there had been a rule granting leave of absence and free transportation to officers of organizations and employees representing the members of the organization and to any employees representing other employees. The Company itself had recognized this rule and N. Plummer Good and other members of the Executive Committee of System Federation No. 90 were at the time of the meeting of May 24th, 1921, and subsequently, on such leave of absence. On the 25th day of July, 1921, the Company notified the officers and representatives of System Federation No. 90, who were thus on furlough, that their furloughs were cancelled and that all were to return to work under penalty of dismissal from service. This summary dismissal was also in violation of the rule theretofore established by the Railroad Administration

by which no employee in the service of a railroad, thirty days or longer, should be discharged for any cause without being given an investigation. The men so notified disregarded the order of the Company and were summarily dismissed.

After making the alleged agreement with the so-called representatives of the shop craft employees the Company began to increase its active force (which as before stated had been reduced almost 50 per cent.) by ordering furloughed employees back to work. In many instances the classification of the returned employees was changed and their wages reduced. All furloughed employees ordered to return to work were requested to sign an agreement as follows:

"PENNSYLVANIA SYSTEM
Altoona Works
Altoona, Pa.....

Mr. P. F. Smith, Jr.,
Works Manager.

I have read the Schedule of Regulations adopted by the Management and representatives of the employees of Altoona Works and put into effect July 1st, 1921, by notice of the Works Manager, and am entirely satisfied to re-enter the service under the conditions laid down in said schedule of regulations.

.....Name

.....Address."

Any furloughed employee, who refused to sign as requested, was refused re-employment. About 5,000 of such furloughed employees were thus refused employment. The plaintiff, La Fontain, is one of such employees, and sues in behalf of himself and all others similarly situated.

At the same time a large number of employees actually at work were requested by the Railroad Company to sign a paper similar to that just mentioned. Upon refusal so to sign they were discharged. The plaintiff, George Cramer, is one of such persons and likewise sues in behalf of himself and all others similarly situated.

Certain of the employees of the Pennsylvania Railroad Company, actually engaged in work, fearing loss of employment and knowing that failure to sign the agreement heretofore mentioned would result in dismissal, signed such agreement. The plaintiff, Henry Rothermill, is one of such persons.

The scheme of organization established by the Pennsylvania Railroad provided for annual elections. No such election was held, however, in 1922, but one was held in 1923. There is no evidence in the case to show how many of the employees of the Pennsylvania Railroad actually at work voted at that election.

After the Pennsylvania Railroad had prepared the ballots, as already related, and had refused to submit the question of the proper form of ballot to the Railroad Labor Board, System Federation No. 90 and the Railway Employees' Department of the American Federation of Labor made an *ex parte* submission of dispute to the

Railroad Labor Board, which held hearings on the controversy. The employees were represented by System Federation No. 90 and by the Railway Employees' Department of the American Federation of Labor and the Pennsylvania Railroad was represented at these hearings by its officers. After a full hearing on both sides and on the 26th of July, 1921, the Railroad Labor Board rendered Decision No. 218. Parts of this Decision are set out in the record (Record, pp. 71 to 78). This decision held substantially that the Railroad Company had no right to assume control of the selection of employees; that it was not justified in refusing the request of the employees to place on the ticket the name of System Federation No. 90; that the employees had the right to vote for representatives who were not employees of the carrier; that all that had been asked was to place the name of the employees' organization on the ballot which would have resulted "as the carrier well knew, in the employees being represented by the officers of the organization who are employees of the carrier;" that the carrier had no right to divide the System into Regions and that the Transportation Act contemplated that the employees directly interested on an entire system shall select representatives; that the ballot submitted by System Federation No. 90 was likewise improper because it did not provide for individual representation. The Labor Board therefore declared both elections invalid and ordered a new election to be held. The decision extended the right to vote to employees who had been laid off on furlough and were entitled to return to the service under seniority rules; it prescribed a form of

ballot; directed that the vote should be taken by crafts and that a majority of each of the respective crafts should have the right to determine by whom they should be represented and that the employees should not be denied the right to name an organization as their representative or to choose an individual who was not an employee of the carrier; it provided for methods of distribution of ballots and counting the vote.

The Company refused to accept Decision No. 218 or to carry out any of its provisions; and refused to cancel the election held by it. Upon this refusal the Board cited the Railroad Company to appear before it at a hearing to be held on October 20th, 1921, in order to determine whether Decision No. 218 had been violated by the Company. A hearing was held; the Railroad Company participated in it, contending that the Labor Board had no jurisdiction over the dispute and no right to determine the manner in which the Company's employees should elect their representatives. After the hearing and before any decision by the Railroad Labor Board the Company secured an injunction from the District Court of the United States for the Northern District of Illinois, enjoining and restraining the Board from proceeding to render a decision and from making publication in such a proceeding. On appeal by the Labor Board to the United States Circuit Court of Appeals, the injunction was vacated. The Company thereupon took an appeal to this Court, which, on the 19th day of February, 1923, affirmed the decision of the Circuit Court of Appeals. The Railroad Labor Board then, on its own motion, again requested the Company

to comply with its Decision No. 218. On the Company's refusal the Railroad Labor Board, on June 12, 1923, rendered Decision 1829, in which it held that the Company had denied to its shop employees essential rights as laboring men to which Congress had declared them entitled (Decision No. 1829: Record, p. 82).

As already mentioned, Decision No. 218 was rendered on the 26th day of July, 1921. On the 3rd day of November, 1921, System Federation No. 90, acting on behalf of its members, submitted to the latter a vote on the following question, to-wit:

> "In the event the Pennsylvania Railroad System refuses to comply with Decision No. 218 of the United States Railroad Labor Board, shall a strike be authorized on a date to be later set?"

An overwhelming majority of the members of System Federation No. 90 answered the question in the affirmative. The vote and action of the members were approved by the Employees' Department of the American Federation of Labor and by International organizations affiliated with it, in accordance with the Constitution and By-Laws of System Federation No. 90. On the first day of July, 1922, System Federation No. 90 authorized its members to cease working for the Pennsylvania Railroad until the Company would comply with the Transportation Act and the decision of the Labor Board. A very large number of members of System Federation No. 90 thereupon went on a "strike," in order to enforce compliance by the Pennsylvania

Railroad with the provisions of the Transportation Act and the decision of the Labor Board.

On March 17, 1923, immediately after the decision of the Supreme Court of the United States affirming the vacation of the injunction which the Pennsylvania Railroad had obtained against the Railroad Labor Board, System Federation No. 90 formally informed the Railroad Company of the readiness of its members to resume their work upon the terms and conditions established by the Railroad Labor Board, under the Transportation Act. The Railroad Company and its officers and managers refused to permit its employees to resume work upon such conditions. The plaintiff, Jacob Kern, is one of the employees of the Company engaged in shop craft work who thus suspended work, and sues herein in his own behalf and in behalf of all other employees similarily situated.

A large number of the employees, members of Federation No. 90, did not avail themselves of the authority to suspend work, but continued at work for the Company under the wages, rules and conditions of work established by the Company under its unlawful alleged agreement with the representatives of the employees.

All of the employees of the Company, members of System Federation No. 90, who worked for the Company between July 1, 1921, and July 1, 1922, received the rate of wages and were compelled to work under the rules and conditions of work established by the Company under the alleged agreement already referred to. These employees contend that they are entitled to be paid by the Company the difference between the

amounts actually received by them in wages and the amount which they would have received under the rate of wages in force on the first day of July, 1921, as established by the United States Railroad Administration and modified by the Railroad Labor Board through the methods and in the manner prescribed by the Transportation Act. The plaintiffs Henry Rothermill and Jacob Kern are such employees and sue herein on behalf of themselves and all others similarly situated.

Likewise, it is contended that all employees of the Pennsylvania Railroad, members of System Federation No. 90, who worked for the said Company after the first day of July, 1921, and have continued to work to the present time were entitled to receive the wages fixed by the United States Railroad Administration as modified by the Railroad Labor Board, and that they are thus entitled to recover from the Pennsylvania Railroad the difference between the wages received by them under the alleged agreement established by the Company and the rate of wages established by the Railroad Administration and the Railroad Labor Board. The plaintiff Keech is such an employee and has brought this suit on behalf of himself and all others similarly situated.

On the facts above summarized, the complainants pray for a decree in effect restraining the defendant Pennsylvania Railroad Company from enforcing the provisions of the alleged agreement made between it and the organizations of employees of its own creation, with respect to wages and working rules; from enforcing any changes in the wages and working rules as they

existed on June 30th, 1921; from continuing to deal with the persons alleged to have been chosen on the "company ballots" as representatives of the employees engaged in mechanical work; from financing, interfering with, directing and controlling alleged organizations of the Company's employees for the purposes set forth in the Transportation Act, and from refusing to confer and deal with System Federation No. 90 as the organization representing the great majority of the Company's employees engaged in such mechanical work.

The complainants also ask for a decree ordering that an account be taken of all the damages sustained by members of System Federation No. 90, and other shop craft employees of the Company in whose behalf this action is brought. The furloughed employees who were refused re-employment in accordance with their seniority rights, and the employees who were discharged by the Company for refusing to waive their rights under the Transportation Act, seek to recover damages for loss of employment, and the Company employees who were compelled by the Company to accept reduced wages under the terms of the alleged agreement with the "company unions," are suing herein for the difference between such wages and the wages in force on June 30, 1921.

TRANSPORTATION ACT.

Title III—Disputes Between Carriers and Their Employees and Subordinate Officials.

Sec. 300. When used in this title:

(1) The term "carrier" includes any express com-

pany, sleeping car company, and any carrier by railroad, subject to the Interstate Commerce Act, except a street, interurban or suburban electric railway not operating as a part of a general steam railroad system of transportation:

(2) The term "Adjustment Board" means any Railroad Board of Labor Adjustment established under Section 302;

(3) The term "Labor Board" means the Railroad Labor Board;

(4) The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation; and

(5) The term "subordinate official" includes officials of carriers of such class or rank as the Commission shall designate by regulation formulated and issued after such notice and hearing as the Commission may prescribe, to the carriers, and employees and subordinate officials of carriers, and organizations thereof, directly to be affected by such regulations.

Sec. 301. "It *shall* be the duty of all carriers and their officers, employees, and agents to exert every rea-

sonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes *shall* be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it *shall* be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute."

Sec. 302. Railroad Boards of Labor Adjustment may be established by agreement between any carrier, group of carriers, or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or group of organizations thereof.

Sec. 303. Each such Adjustment Board shall, (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon the written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, (3) upon the Adjustment Board's own motion, or (4) upon the request of the Labor Board whenever such board is of the opinion that the dispute is likely substantially to interrupt commerce, receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving

only grievances, rules, or working conditions, not decided as provided in section 301, between the carrier and its employees or subordinate officials, who are, or any organization thereof which is, in accordance with the provisions of Section 302, represented upon any such Adjustment Board.

Sec. 304. There is hereby established a board to be known as the "Railroad Labor Board" and to be composed of nine members as follows:

(1) Three members constituting the labor group, representing the employees and subordinate officials of the carriers, to be appointed by the President, by and with the advice and consent of the Senate from not less than six nominees whose nominations shall be made and offered by such employees in such manner as the Commission shall by regulation prescribe

(2) Three members, constituting the management group, representing the carriers, to be appointed by the President, by and with the advice and consent of the Senate, from not less than six nominees whose nominations shall be made and offered by the carriers in such manner as the Commission shall by regulation prescribe; and

(3) Three members, constituting the public group, representing the public, to be appointed directly by the President, by and with the advice and consent of the Senate.

Any vacancy on the Labor Board shall be filled in the same manner as the original appointment.

Sec. 305. If either the employees or the carriers fail to make nominations and offer nominees in accordance with the regulations of the Commission, as provided in paragraphs (1) and (2) of Section 304, within thirty days after the passage of this Act in case of any original appointment to the office of member of the Labor Board, or in case of a vacancy in any such office within fifteen days after such vacancy occurs, the President shall thereupon directly make the appointment, by and with the advice and consent of the Senate. In making any such appointment the President shall, as far as he deems it practicable, select an individual associated in interest with the carriers or employees thereof, which ever he is to represent.

Sec. 306. (a) Any member of the Labor Board who during his term of office is an active member or in the employ of or holds any office in any organization of employees or subordinate officials, or any carrier, or owns any stock or bond thereof, or is pecuniarily interested therein, shall at once become ineligible for further membership upon the Labor Board; but no such member is required to relinquish honorary membership in, or his rights in any insurance or pension or other benefit fund maintained by, any organization of employees or subordinate officials or by a carrier.

(b) Of the original members of the Labor Board, one from each group shall be appointed for a term of three years, one for two years, and one for one year. Their successors shall hold office for terms of five years, except that any member appointed to fill a vacancy shall

be appointed only for the unexpired term of the member whom he succeeds. Each member shall receive from the United States an annual salary of $10,000. A member may be removed by the President for neglect of duty or malfeasance in office, but for no other cause.

Sec. 307. (a) The Labor Board shall hear, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions, in respect to which any Adjustment Board certifies to the Labor Board that in its opinion the Adjustment Board has failed or will fail to reach a decision within a reasonable time, or in respect to which the Labor Board determines that any Adjustment Board has so failed or is not using due diligence in its consideration thereof. In case the appropriate Adjustment Board is not organized under the provisions of section 302, the Labor Board, (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions which is not decided as provided in section 301 and which such Adjustment Board would be required to receive for hearing and decision under the provisions of section 303.

(b) The Labor Board, (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable and with due diligence decide, all disputes with respect to the wages or salaries of employees or subordinate officials of carriers, not decided as provided in section 301. The Labor Board may upon its own motion within ten days after the decision, in accordance with the provisons of section 301 of any dispute with respect to wages or salaries of employees or subordinate officials of carriers, suspend the operation of such decision if the Labor Board is of the opinion that the decision involves such an increase in wages or salaries as will be likely to necessitate a substantial readjustment of the rates of any carrier. The Labor Board shall hear any decision so suspended and as soon as practicable and with due diligence decide to affirm or modify such suspended decision.

(c) A decision by the Labor Board under the provisions of paragraphs (a) or (b) of this section shall require the concurrence therein of at least 5 of the 9 members of the Labor Board; *Provided*, That in case of any decision under paragraph (b), at least one of the representatives of the public shall concur in such deci-

sion. All decisions of the Labor Board shall be entered upon the records of the board and copies thereof, together with such statement of facts bearing thereon as the board may deem proper, shall be immediately communicated to the parties to the dispute, the President, each Adjustent Board, and the Commission, and shall be given further publicity in such manner as the Labor Board may determine.

(d) All the decisions of the Labor Board in respect to wages or salaries and of the Labor Board or an Adjustment Board in respect to working conditions of employees or subordinate officials of carriers shall establish rates of wages and salaries and standards of working conditions which in the opinion of the board are just and reasonable. In determining the justness and reasonableness of such wages and salaries or working condition the board shall, so far as applicable, take into consideration among other relevant circumstances:

(1) The scales of wages paid for similar kinds of work in other industries;

(2) The relation between wages and the cost of living;

(3) The hazards of the employment;

(4) The training and skill required;

(5) The degree of responsibility;

(6) The character and regularity of the employment; and

(7) Inequalities of increases in wages or of treatment, the result of previous wage orders or adjustments.

Sec. 308. The Labor Board——

(1) Shall elect a chairman by majority vote of its members;

(2) Shall maintain central offices in Chicago, Illinois, but the Labor Board may, whenever it deems it necessary, meet at such other place as it may determine;

(3) Shall investigate and study the relations between carriers and their employees particularly questions relating to wages, hours of labor, and other conditions of employment and the respective privileges, rights and duties of carriers and employees, and shall gather, compile, classify, digest, and publish, from time to time, data and information relating to such questions to the end that the Labor Board may be properly equipped to perform its duties under this title and that the members of the Adjustment Boards and the public may be properly informed;

(4) May make regulations necessary for the efficient execution of the functions vested in it by this title; and

(5) Shall at least annually collect and publish the decisions and regulations of the Labor Board and the Adjustment Boards and all court and administrative decisions and regulations of the Commission in respect to this title, together with a cumulative index-digest thereof.

Sec. 309 Any party to any dispute to be considered by an Adjustment Board or by the Labor Board shall be entitled to a hearing either in person or by counsel.

Sec. 310. (a) For the efficient administration of the functions vested in the Labor Board by this title, any member thereof may require, by subpoena issued and signed by himself, the attendance of any witness and the production of any book, paper, document, or other evidence from any place in the United States at any designated place of hearing, and the taking of a deposition before any designated person having power to administer oaths. In the case of a deposition the testimony shall be reduced to writing by the person taking the deposition or under his direction, and shall then be subscribed to by the deponent. Any member of the Labor Board may administer oaths and examine any witness. Any witness summoned before the board and any witness whose deposition is taken shall be paid the same fees and mileage as are paid witnesses in the courts of the United States.

(b) In case of failure to comply with any subpoena or in case of the contumacy of any witness appearing before the Labor Board, the board may invoke the aid of any United States district court. Such court may thereupon order the witness to comply with the requirements of such subpoena, or to give evidence touching the matter in question, as the case may be. Any failure to obey such order may be punished by such court as a contempt thereof.

(c) No person shall be excused from so attending

and testifying or deposing, nor from so producing any book, paper, document, or other evidence on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing, as to which obedience to a subpoena and under oath, he may so testify or produce evidence, documentary or otherwise. But no person shall be exempt from prosecution and punishment for perjury committed in so testifying.

Sec. 311. (a) When necessary to the efficient administration of the functions vested in the Labor Board by this title, any member, officer, employee, or agent thereof, duly authorized in writing by the board, shall at all reasonable times for the purpose of examination have access to and the right to copy any book, account, record, paper, or correspondence relating to any matter which the board is authorized to consider or investigate. Any person who upon demand refuses any duly authorized member, officer, employee, or agent of the Labor Board such right of access or copying, or hinders, obstructs, or resists him in the exercise of such right, shall upon conviction thereof be liable to a penalty of $500 for each such offense. Each day during any part of which such offense continues shall constitute a separate offense. Such penalty shall be recoverable in a civil suit brought in the name of the United States, and shall be covered into the Treasury of the United States as miscellaneous receipts.

(b) Every officer or employee of the United States, whenever requested by any member of the Labor Board or an Adjustment Board duly authorized by the board for the purpose, shall supply to such board any data or information pertaining to the administration of the functions vested in it by this title, which may be contained in the records of his office.

(c) The President is authorized to transfer to the Labor Board any books, papers, or documents pertaining to the administration of the functions vested in the board by this title, which are in the possession of any agency, or railway board of adjustment in connection therewith, established for executing the powers granted the President under the Federal Control Act and which are no longer necessary to the administration of the affairs of such agency.

Sec. 312. "Prior to September 1, 1920, each carrier shall pay to each employee or subordinate official thereof wages or salary at a rate not less than that fixed by the decision of any agency, or railway board of adjustment in connection therewith, established for executing the powers granted the President under the Federal Control Act, in effect in respect to such employee or subordinate official immediately preceding 12.01 A. M. March 1, 1920." Any carrier acting in violation of any provision of this section shall upon conviction thereof be liable to a penalty of $100 for each such offense. Each such action with respect to any such employee or subordinate official and each day or portion thereof during which the offense continues shall constitute a separate

offense. Such penalty shall be recoverable in a civil suit brought in the name of the United States, and shall be covered into the Treasury of the United States as miscellaneous receipts.

Sec. 313. The Labor Board, in case it has reason to believe that any decision of the Labor Board or of any Adjustment Board is violated by any carrier, or employee or subordinate official, or organization thereof, may upon its own motion after due notice and hearing to all persons directly interested in such violation, determine whether in its opinion such violation has occurred and make public its decision in such manner as it may determine.

Sec. 314. The Labor Board may (1) appoint a secretary, who shall receive from the United States an annual salary of $5,000; and (2) subject to the provisions of the civil-service laws, appoint and remove such officers, employees, and agents; and make such expenditures for rent, printing, telegrams, telephone, law books, books of reference, periodicals, furniture, stationery, office equipment, and other supplies and expenses including salaries, traveling expenses of its members, secretary, officers, employees, and agents, and witness fees, as are necessary for the efficient execution of the functions vested in the board by this title and as may be provided for by Congress from time to time. All of the expenditures of the Labor Board shall be allowed and paid upon the presentation of itemized vouchers therefor approved by the chairman of the Labor Board.

Specification of Errors.

Sec. 315. There is hereby appropriated for the fiscal year ending June 30, 1920, out of any money in the Treasury not otherwise appropriated, the sum of $50,000, or so much thereof as may be necessary, to be expended by the Labor Board, for defraying the expenses of the maintenance and establishment of the board, including the payment of salaries as provided in this title.

Sec. 316. The powers and duties of the Board of Mediation and Conciliation created by the Act approved July 15, 1913, shall not extend to any dispute which may be received for hearing and decision by any Adjustment Board or the Labor Board.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In affirming the decree of the District Court of the United States for the Eastern District of Pennsylvania dismissing the bill filed by the appellants.

2. In deciding and holding as follows:

> "We do not understand just what the complainants mean by their 'civil' rights. If they mean such as are accorded labor by general law—the right lawfully to organize, *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, the right to bargain collectively, the right to strike—no evasion of such rights is shown and, accordingly, none is here in question."

3. In holding and deciding as follows:

> "Moreover, the complainants have expressly grounded their actions on the Transportation Act of 1920 and, limiting their grievance against the respondents to their refusal to observe its terms, they have asserted that the conduct of the respondents is in violation of rights granted them by that Act in declaring a national policy in respect to railroad labor disputes. Thus both the pleadings and the facts show that complainants stand on their statutory rights."

4. In deciding and holding as follows:

> "It is evident that in enacting the Transportation Act of 1920, and, through it, affording means by which to prevent interruption of interstate commerce by labor disputes and strikes, the Congress had the public interest first in mind. It was more concerned in protecting the public than in conferring rights upon railroad employers and employees. To this end it set up machinery which these contending forces could invoke to compose their differences, or which could be invoked against them. This machinery was novel in character and was intended to function not by ordinary processes but by the force of public opinion. It did not disturb many of the rights which theretofore admittedly belonged to an interstate carrier and to its employees. The carrier's right to deal with individual representatives of its employees remained. The right of employees, who are members of labor unions, to select their

own conference representatives without the right of their employer to restrict their selection to its own employees and exclude officers of labor unions was not abridged. Moreover, the 'statute does not require (the carrier) to recognize or to deal with, or confer with labor unions. It does not require employees to deal with their employees through their fellow employees.'"

5. In deciding and holding as follows:

"With such rights preserved to these opposing forces and with no new rights of the kind here in issue expressly given them, the statute imposes certain duties and confers certain powers upon the Labor Board. One of these is the power to decide a labor dispute between a carrier employer and its employees. This power of decision, however, does not carry with it a power of execution. Obedience to decisions of the Labor Board is not compulsory; enforcement of its decisions rests solely upon public opinion marshalled on publication of the conduct of the offending party. This is as true of interlocutory decisions as of final decision. Though a decision be in favor of employees, we can not find anything in the statute which gives them a right to its enforcement by the Courts."

6. In deciding and holding as follows:

"But we find nothing in the statute which makes it compulsory upon the employer to confer with the representatives of the employees or

further to contest the matter before the Labor Board. Though liable to such punishment as public opinion may inflict, the employer (and likewise, in a reverse situation, the employees) may, for any reason, or no reason at all, decline further to engage in the dispute. As obedience to the mandate of Decision No. 218 of the Labor Board respecting a new election of representatives was not compulsory upon the Company, its refusal to obey the decision violated no legal or equitable rights of the complaining employees. This is an instance where the machinery which the Congress set up did not work through to final decision and resulted in no punishment except that of public opinion directed against the Company by the announcement of the Labor Board's Decision No. 1829. As the Transportation Act of 1920 makes no provision for a situation where one of the parties defaults, it does not provide the other party (in this instance the employees) with means to coerce the defaulting party."

7. In deciding and holding as follows:

"Further asserting statutory rights in themselves, the complainants maintain that the conduct of the Company and its officers was a statutory offense in the nature of conspiracy under the provisions of Section 19 of the Criminal Code which provides that, 'If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise and enjoyment of any right or privilege, secured to him by the * * * laws of the United States,' they shall be punished,

and they further maintain that injunction will lie to restrain means for promoting such conspiracy. *Pettibone* v. *United States*, 148 U. S. 197; *Duplex Co.* v. *Deering*, 254 U. S. 465. Even so, the thing which is done or is threatened must in itself be unlawful, or, if unlawful, it must be carried out by unlawful means in order to constitute a conspiracy. The thing here charged against the Company was conduct which, under the terms of the Transportation Act and in the light of the decision of the Supreme Court in *Pennsylvania Railroad Company* v. *Labor Board*, *supra*, was not unlawful either in purpose or in means employed to carry out the purpose. It follows that in their conspiracy charge the complainants are not aided by a statutory right."

8. In deciding and holding that the defendants have not violated, are not violating and threatening to continue violating a positive statutory law, *i. e.*, the Transportation Act of 1920.

9. In deciding and holding that the defendants, Pennsylvania Railroad Company, its officers, defendants herein, and the other individual defendants have not committed violations of the Transportation Act by agreement and co-operation and that such agreement and co-operation did not constitute a conspiracy.

10. In deciding and holding that the acts of the defendants complained of herein did not violate the complainants' civil and statutory rights, and injure and

oppress them in the free exercise and enjoyment of such rights.

11. In deciding and holding that the complainants have not sustained and are not sustaining pecuniary losses and other damages by reason of the defendants' unlawful acts for which they have no adequate remedy at law.

12. In deciding and holding that the complainants are not entitled to the injunctive relief and money damages prayed for in the Bill of Complaint herein.

13. In deciding and holding as follows:

> "For these several reasons we are constrained to hold with the learned trial Judge (294 Fed. 556 and 296 Fed. 220) that the complainants have not shown rights for the enforcement of which the processes of a court of equity are available."

Argument.

The Theory of the Case.

At the outset it should be noted that this is not an action to enforce a decision of the Railroad Labor Board, but one to enjoin the violation of an express statutory provision. The complainants' case is entirely independent of Decisions Nos. 119 and 218 of the Railroad Labor Board prescribing rules and a form of ballot for the choice of representatives by the employees of the Company, or Decision No. 1829 declaring that the

Company had violated such decision. The complainants rely on the provisions of the Transportation Act as such, and their cause of action would be sufficient and complete if the Railroad Labor Board had never rendered any of the three decisions or taken cognizance of any of the grievances alleged in the Bill of Complaint.

Such decisions are relied on merely as authoritative adjudications of the facts involved therein and as lawful regulations made by the Board.

Nor does the case rest entirely upon the theory of a conspiracy. The conspiracy is charged as a conclusion of law arising from the commission of an illegal act by prearranged and concerted action between the defendants, but the complainants contend that this action would be fully maintainable even if no case of conspiracy had been made out.

The plaintiffs base their action on the familiar rule that courts of equity have the inherent power to restrain violations of law, where such violations are continuous in character, and that suits for injunctions restraining such violations will be entertained at the instance of a private party upon proof that his civil rights are violated or his property rights invaded, and that he has no adequate remedy at law.

Walla Walla City v. *Walla Walla Water Co.*, 172 U. S. 1;

Coty v. *Prestonette*, 285 Fed. 501;

Stephens v. *Ohio State Telephone Co.*, 240 Fed. 759;

Sailors Union v. *Hammond Lumber Co.*, 156 Fed. 450.

Argument.

Another statement of the complainants' main cause of action is that it seeks to restrain a continuing conspiracy to violate the laws invoking the rule that courts of equity will restrain such a conspiracy at the suit of the party against whom it is directed and upon proof of irreparable damage and absence of an adequate remedy at law.

Arthur v. *Oakes*, 63 Fed. 310;
Hopkins v. *Oxley Stave Co.*, 83 Fed. 912;
Vonnegut Machinery Co. v. *Toledo Machine & Tool Co.*, 263 Fed. 192.

The damage claims in the Bill of Complaint are predicated upon proof that the complainants, as employees of the Company, have sustained pecuniary damages by reason of the unlawful acts sought to be restrained by a decree of the Court, and upon the theory that such causes of action for damages are properly joined in the equitable suit for injunction, because they flow directly from the unlawful acts proven, and the main suit being in equity, the Court will pass upon all phases of the controversy and make a complete determination of the rights of the parties, including the award of money damages as an incidental relief, and also because an adjudication of the damage claims will avert a multiplicity of actions.

The appellants contend that the record in this case establishes the following uncontroverted facts:

I. The defendants have violated, are violating and

threaten to continue violating a positive statutory law, *i. e.*, the Transportation Act of 1920.

II. The violations of the Transportation Act herein complained of were and are committed by agreement and co-operation between the defendants Pennsylvania Railroad Company, its officers defendants herein and by the other individual defendants, and the agreement and the defendants' acts under the same, constitute a conspiracy.

III. The unlawful acts and conspiracy on the part of the defendants violate the complainants' civil and statutory rights, and injure and oppress them in the free exercise and enjoyment of such rights.

IV. The complainants have sustained and are sustaining pecuniary losses and other damages by reason of the defendants' unlawful acts, for which they have no adequate remedy at law.

V. The complainants are the proper parties to maintain this suit.

VI. The complainants are entitled to the injunctive relief prayed for herein.

VII. The complainants are entitled to money damages and to a decree ordering that an accounting be taken of such damages.

The remaining portions of this brief will be devoted to a discussion of the propositions above advanced.

POINT I.

The defendants have violated, are violating and threaten to continue violating a positive statutory law, *i. e.*, the Transportation Act of 1920.

The action is brought under Title III of the Transportation Act entitled: "Disputes Between Carriers and their Employees and Subordinate Officials," and the questions involved in this suit turn very largely upon the construction of the provisions of this title.

To put it tersely, the contention of the complainant is that Title III of the Transportation Act in effect provides for a system of arbitration of disputes between carriers and their employees which is compulsory up to the point of compliance with the final decisions of the Railroad Labor Board; that while the parties to any dispute about wages and working rules are at liberty to reject the Board's *final* decision on such dispute, all steps leading up to such decision as prescribed by the Transportation Act and all other positive directions of the Act are mandatory upon the parties to the dispute and enforcible by process.

That this was the intention of Congress in passing the Transportation Act is evidenced from the history of the legislation with respect to labor disputes on railroads, the committee reports and debates in Congress, the explicit statement of the President of the United States in approving of the Act, the general plan of Title III, and above all the text of the enactment itself.

It is a matter of common knowledge that the frequent labor disputes on the railroads of the United States have, particularly in recent years, been the subject of grave

public concern because such disputes have, on numerous occasions, led or threatened to lead to interruptions of the operations of the roads, involving serious disturbances in the whole national system of commerce and transportation.

In view of the vital interest of the people in maintaining regular and uninterrupted railroad service throughout the country, Congress has ever been in quest of efficient methods of avoiding, minimizing or adjusting controversies between railroad corporations and their employees.

A voluntary Board of Arbitration with functions limited to the railroad industry was created by Congressional enactment as early as 1886 (38 Stat. 63).

The Erdman Act of June 1st, 1898, and the Newlands Act of July 15, 1913, both provided for the establishment of Boards of Arbitration.

While each succeeding Congressional act sought to perfect the features of arbitration in railroad labor disputes, none of the arrangements proved effective to compose all disputes between carriers and employees and to avert serious interruptions in the operation of the railroads as a result of such disputes. In the fall of 1916, the danger of a general tie-up of the railroad system of the country was so imminent that Congress found itself impelled to take the dispute into its own hands and to adjust the same by means of a direct statutory enactment establishing eight hours as the standard of a day's work for train service employees and providing for increased wages for work in excess of such hours.

Point I.

During the period of Federal control, the United States Railroad Administration succeeded in preventing any serious interruption in the operation of the railroads through fair dealings with the employees and equitable adjustment of all disputes as to wages and working conditions.

One of the first acts of the administration was to do away with the practice of discriminating against membership in certain labor unions. This was accomplished by General Order No. 8 declaring that "no discrimination will be made in the employment, retention or conditions of employment of employees because of membership or non-membership in labor organizations."

The wages of the railroad employees were twice increased by the United States Railroad Administration in keeping with the growing cost of living. With reference to the employees in the mechanical departments of the railroads, the United States Railroad Administration enacted definite and uniform classifications of work, abolished the very unsatisfactory system of piecework, established "seniority rights," provided against arbitrary dismissals and, above all, created effective machinery for the adjustment of all grievances of employees.

The rights thus conferred upon the railroad employees were secured by formal agreement entered into between the United States Railroad Administration and the recognized organizations of the workers. The provisions of that agreement were strictly observed and all decisions of adjustment boards on grievances of employees were scrupulously lived up to.

Point I.

The ability of the United States Railroad Administration to maintain harmonious relations and to prevent interruptions in the operation of the railroad service was due to the fact that the Board was acting not only in behalf of the Government of the United States but also as the employer. It was thus placed in a position to execute the decisions of the adjustment boards directly and without the necessity of enforcing them on a third party.

The experience gained during the period of Federal control was fresh in the minds of the members of Congress when the provisions of the new law were being discussed in connection with the proposed termination of Federal control.

There were two definite currents of opinion in the minds of the people with respect to the system of operating the railroads of the country after the termination of the period of war-time control. One favored permanent Government ownership of the railroads after the example of most countries of Europe. This plan was incorporated in a bill introduced in the House of Representatives on August 2, 1919 (H. R. 8157), by Representative Sims entitled "A bill authorizing the acquisition by the United States of private interest in railroads and transportation properties, and for the payment of just compensation therefor, and providing the means for determining such compensation; creating a corporation for public service, with authority to operate the properties so acquired, and authorizing a lease to such corporation of such properties when so acquired, and for other purposes." The other view

favored the return of the railroads to their former owners, and several bills to effect such re-transfer were introduced in Congress.

The Transportation Act eventually adopted on February 28, 1920, was to some extent a compromise between the two conflicting policies. It intended to return the railroads to their former private owners subject, however, to larger responsibilities with respect to their operation to the public and their employees and with more effective provisions against interruption in the operation of the roads.

In dealing with the latter phase of the problem, Congress clearly recognized that the main and practically the sole cause of such interruptions are labor disputes and that such disputes invariably revolved around the question of wages and working rules and conditions. The problem of securing uninterrupted service on the railroads thus essentially resolves itself into a question of settling or adjusting disputes between carriers and their employees on these subjects. The primary object of Congress in enacting Title III of the Transportation Act therefore was to provide appropriate machinery for the establishment of fair and reasonable wages and working conditions on the railroads. On this subject the statement of Representative Esch in reporting the Bill in the House of Representatives is very illuminating. It is in part as follows:

> "Our theory is that primarily, fundamentally, we must create such a tribunal for the ascertainment of facts and the decision of questions

relating to wages and hours of service and working conditons as will commend it to the judgment of mankind. Unless we can do that there will be doubt as to the validity and the justice of the award and there will be those who will want to break from such an award. If we can create a tribunal so fair, so honest, so honorable that neither party to the controversy can cast aspersions upon it, have we not gone a long way toward begetting respect for the award of that tribunal not merely on the part of the parties interested in the dispute, but on the part of the general public?"

Congress recognized two methods of establishing fair and reasonable wages and working conditions: one, by agreement between the parties themselves and the other to be resorted to only in case of failure of the parties to agree, by the decision of an impartial and authoritative tribunal.

The merit of the first method is quite obvious. An agreement freely arrived at by the parties directly concerned in the dispute is, of course, acceptable to both parties alike and meets the highest test of fairness and reasonableness. This condition, however, presupposes a *bona fide* agreement actually and voluntarily made between the parties to the dispute. The Transportation Act, as all law, looks to the substance and not to the mere form. An alleged agreement forced upon the employees or acquiesced in by a small portion of such employees against the decided opinion of the large majority will, of course, not satisfy the require-

ments of the law. This is undoubtedly what Congress had in mind in providing by Section 301 of the Transportation Act that all disputes be considered and, if possible, decided in conference between *representatives designated and authorized so to confer* by the carriers *or the employees.*

Realizing, however, that voluntary agreements are not often reached in conference between disputants and that there is no way of forcing such agreements, Congress determined to prevent the dangerous consequences of unadjusted disputes by taking them out of the hands of the parties when they had reached a deadlock in their negotiations.

To this end it provided that the Labor Board or the Adjustment Board as the case may be, shall establish rates of wages and standards of working conditions which in the opinion of the Board are just and reasonable (Sec. 307-d), and Congress has made every possible provision to give weight and authority to such decisions of the Boards. With that object in view, the Railroad Labor Board, which alone has jurisdiction over the question of wages, is constituted of persons of high standing appointed by the President by and with the advice and consent of the Senate, who equally represent all interested groups involved in a dispute, the management, the workers and the public.

The decisions of the Board must be based on a thorough study of the controversies and in order to enable it to make such study, the Transportation Act empowers the Board to compel the attendance of the

parties to the dispute and other witnesses as well as the production of books and documents. The Act furthermore provides in detail the elements and features to be considered by the Board in determining the justness and reasonableness of the wages of railway employees, such elements being as follows:

> "(1) The scale of wages paid for similar kinds of work in other industries;
>
> (2) The relation between wages and the cost of living;
>
> (3) The hazards of the employment;
>
> (4) The training and skill required;
>
> (5) The degree of responsibility;
>
> (6) The character and regularity of the employment; and
>
> (7) Inequalities of increases in wages or of treatment, the result of previous wage orders or adjustments."

The final decision thus reached by the Railroad Labor Board on the question of what shall constitute just and reasonable wages from time to time is not enforcible by process. As this Court has said in the case of *Pennsylvania R. R. Co.* v. *U. S. Labor Board*, 261 U. S. 72:

> "The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of

such decision by any party to the proceeding. The evident thought of Congress in these provisions is that the economic interests of every member of the Public in the undisturbed flow of interstate commerce and the acute inconvenience to which all must be subjected by an interruption caused by a serious and widespread labor dispute, fastens public attention closely on all circumstances of the controversy and arouses public criticism of the side thought to be at fault. The function of the Labor Board is to direct that public criticism against the party who, it thinks, justly deserves it."

The reasons why Congress has not chosen to make the decisions of the Railroad Labor Board with respect to wages enforcible by process, are made quite evident from the reports and the debates in Congress on that subject. If such decisions were made binding, provisions would have to be made in the law for enforcing them equally upon the carrier and their employees. Such, in fact, was the original intention of the authors of the Bill. The first and second drafts of the Cummins Bill in Senate (S. 2906 introduced August 23, 1919, and S. 3288 introduced October 22, 1919), both provide for penalties against carriers refusing to obey the decision of the Board and against employees going on strike in violation of such a decision. The first draft of the Esch Bill in the House of Representatives (H. R. 10453 introduced November 8, 1919), makes the carriers and labor unions reciprocally responsible in damages for violations of the decisions of the Railroad Labor Board. In the end, however, Congress seems to have reached the con-

clusion that while it had the power to enforce a scale of wages upon railroad companies (*Wilson* v. *New*, 243 U. S. 35), it had no corresponding constitutional power to force the acceptance of a fixed scale of wages by employees as such legislation would come in conflict with the constitutional prohibition of involuntary servitude.

Congress furthermore was reluctant to embark upon the policy of direct anti-strike legislation. On the subject, the statement of Mr. Esch, one of the authors of the Transportation Act, is illuminating. It is in part as follows:

> "We have not gone to the limit in putting in an anti-strike clause * * *. Strikes are threatened which involve not merely hundreds of men, as strikes used to in an early day, but strikes are now pending that involve millions. Gentlemen, not as a matter of sentiment; not, if you please, as a matter of so-called justice; but as a matter of workability, how are we to enforce a law penalizing strikes when the strike may involve several hundred of thousands of men? My fear is that if men are permitted to disregard a law and see that it is not to be enforced, they will be inclined to disregard other laws."

While Congress in the words of Representative Esch has not "gone to the limit" of making the decisions of the Railroad Labor Board legally enforcible by mandatory provisions against the carrier and prohibition of strikes against the employees, it has gone to the limit of insuring the rendition of a decision by the Railroad Labor Board establishing just and reasonable wages in all dis-

putes between the parties on that subject. Depending in the last analysis upon the moral efficacy of such decisions to prevent strikes or other interruptions in the operation of the roads, Congress determined not to tolerate any obstacles to be placed in the way of such decisions. It has in effect said to both parties: "When the Railroad Labor Board renders a final decision on the merits in any wage dispute, you are at liberty to accept or reject the same. If you reject it, you may fight out your controversy with your own weapons, but you must not declare war before the Railroad Labor Board has been given a chance to pass upon the dispute between you and render a fair decision, and you must not impede the processes provided by the Transportation Act to enable the Board to render such a decision." The language of Title III of the Transportation Act leaves no doubt about the mandatory character of all proceedings leading up to the final decision of the Railroad Labor Board.

Section 301 of the Act, which initiates the proceeding, reads:

> "It *shall be the duty* of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes *shall* be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute.

> If any dispute is not decided in such conference, it *shall* be referred by the parties thereto to the Board which under the provisions of this title is authorized to hear and decide such dispute."

Of course the human mind cannot devise a method to force parties to consider disputes in good faith or to decide such disputes but the statute does the next best thing; it directs in mandatory terms meetings between the parties and provides that if they fail to agree they "shall" refer the differences to the Railroad Labor Board.

This provision, however, is not the only one conferring jurisdiction on the Railroad Labor Board. If the parties do not jointly refer their disputes to the Board as directed by Section 301, the carrier alone or the organization of employees alone may so refer it, and if neither of the two parties to the dispute refers the same, the Board is authorized to take jurisdiction on its own motion (Sections 303, 307).

These provisions indicate the essential difference between the Labor Title of the Transportation Act and the provisions for arbitration contained in the earlier railroad statutes. In all previous legislation, the arbitration boards were purely voluntary tribunals, which could obtain jurisdiction only by voluntary submission of both parties. If either or both refused to arbitrate, the Board could not function. Under the terms of the Transportation Act, the Railroad Labor Board is given jurisdiction over disputes between carriers and their employees independently of the desires of either or both. The Board in this respect is constituted as a court with power to issue process on the complaint of either party and even

on its own motion. The Railroad Labor Board furthermore is authorized by Section 302 to issue subpoenas to compel the attendance of any witness and the production of any book, paper, document or other evidence from any place in the United States, to administer oaths and examine witnesses. By Section 308, Subdivision 4, the Board is moreover, empowered to make regulations "necessary for the efficient execution of the functions vested in it" by the Transportation Act.

The defendants Pennsylvania Railroad Company and its officers clearly disregarded the statutory duties imposed upon them by Section 301 of the Transportation Act when they refused to consider the disputes pending between the road and its shop craft employees in conference with System Federation No. 90 and further disregarded their statutory duty under said section in failing and refusing to refer such disputes to the Railroad Labor Board.

It is admitted on the record that on the 24th day of May, 1921, disputes involving rules and working conditions were pending between the defendant company and its employees engaged in shop or mechanical work. These controversies had their inception prior to the enactment of the Transportation Act, *i. e.*, on or about the 1st day of February, 1920, at which time the Dircetor General declined to act upon the same in view of the approaching termination of Federal control (Bill of Complaint, Paragraph 17 admitted by Answer, Paragraph Seventeenth). The dispute was passed on to the Railroad Labor Board, which received and took cognizance of the same on the day after its members were confirmed by the Senate,

April 15, 1920. With respect to such disputes, Decision No. 2 of the Railroad Labor Board made the following statement and ruling, to wit:

> "There are in the dispute as presented questions involving rules and working conditions, some of which are interwoven with and materially affect earnings and wages. Adequate investigation and consideration of these questions would demand time. Existing conditions required that the Board should make as early decision of the wage question as practicable. For that reason, it has been necessary—and both parties to the controversy have indicated it to be their judgment and wish, that the Board should separate the questions involving rules and working conditions from the wage questions. Accordingly, the Board has not undertaken herein to consider or change the rules and agreements now existing or in force by the authority of the United States Railroad Administration or otherwise and this decision will be so understood and applied.
>
> The Board assumes as the basis of this decision the continuance in full force and effect of the rules, working conditions and agreements in force under the authority of the United States Railroad Administration. Pending the presentation, consideration and determination of the questions pertaining to the continuation or modification of such rules, conditions and agreements *no changes therein shall be made except by agreement between the carrier and employees concerned.*"

(Bill of Complaint, Paragraph 21 admitted by the Answer, Paragraph Twenty-first.)

Point I.

By supplementing Decision 119, the Railroad Labor Board found:

> "The duty imposed by Section 301 on all carriers and their officers, employees and agents to consider and if possible to decide in conference all disputes between carriers and their employees has not been performed by the parties hereto either with regard to the wage *or the working conditions portion* of this dispute."

and decided:

> "The Labor Board calls upon the officers and *system organizations of employees* of each carrier, parties hereto, to designate and authorize representatives to confer and to decide so much of this dispute relating to rules and working conditions as it may be possible for them to decide. Such conferences shall begin at the earliest possible date."

(Bill of Complaint, Paragraph 26 admitted by the Answer, Paragraph Twenty-sixth.)

The duty of the Company and its officers to confer with their employees on the disputed rules and working conditions was thus not only generally fixed by statute but by direction of the Railroad Labor Board. That direction was in the nature of a regulation "necessary for the efficient execution of the functions vested in" the Railroad Labor Board, and had the force of law as much as if it had been incorporated in the body of the Transportation Act itself.

The conferences provided by Section 301 of the Trans-

portation Act are directed to be held between designated and authorized representatives of the carriers and of "the employees" of such carriers. The phrase "*the employees*" thus used in the statute can have no meaning other than the majority, if not the totality of such employees. The Transportation Act throughout assumes the existence of regular organizations of employees representing the bulk of workers in each division of the service and makes special provisions for unorganized minorities of not less than one hundred persons. Thus Sections 303 and 307 direct the Adjustment Boards and the Railroad Labor Board respectively to hear disputes "upon a written petition signed by not less than one hundred unorganized employees." Organizations of employees are assumed throughout the Act to represent majority groups of employees and to have authority to speak for them. . In fact the entire scheme for the adjustment of labor disputes formulated in Title III of the Transportation Act is predicated upon collective action between the carriers and the labor unions representing their employees. Section 301 assumes the existence of organized bodies of employees capable of representing the workers in conferences with the carriers and of referring disputes to the Adjustment Boards or to the Labor Board.

Section 303 in express terms directs the Adjustment Board to receive disputes for hearing upon the application "of the chief executive of any (carrier or) organization of employees."

Section 307 confers the same rights upon an "organ-

ization of employees" with respect to disputes cognizable by the Labor Board.

Section 313 authorizes the Labor Board to take action in the event of a violation of its decision by "an organization of employees."

At the time of the passage of the Transportation Act and prior thereto, the vast majority of employees on the railroads were organized in labor unions. During the period of Federal control such labor unions were officially and uniformly recognized by the United States Railroad Administration as the authorized spokesman and representatives of the railroad employees, and the Administration officially dealt and contracted with them in behalf of all such employees. The existence and extent of such organizations were facts of general public knowledge, and in the enactment of the Transportation Act Congress took notice thereof and legislated with respect to it. In fact the Bill originally introduced in the House of Representatives (H. R. 10453) limited the disputes which were to be considered under its labor provisions to those involving employees who were members of recognized labor unions, defining the term "union" as "any national craft, trade, labor or industrial organization of employees, 5000 or more of whose members are employees of carriers." The Bill as finally passed eliminated the specific description of labor unions and added provisions for the adjustment of disputes of groups of unorganized workers, but the whole scheme of adjustment of disputes remained predicated upon the existence and operations of labor unions.

Section 304 of the Transportation Act provides for

the appointment of three representatives of the "labor group" as members of the Railroad Labor Board from six nominees "whose nominations shall be made and offered by such employees, in such manner as the (Interstate Commerce) Commission shall by regulation prescribe."

Immediately upon the passage of the Act, the Interstate Commerce Commission made regulations for such nominations of which the following portions are quoted:

> "The overwhelming majority of the railroad employees and subordinate officials stated by those who are in a position to speak with confidence and authority to be more than 90 per cent., are members of or represented through certain organizations of employees. These organizations and their representatives have been recognized as authorized to speak for and represent the several classes of employees by the railroad companies prior to Federal control, by the Railroad Administration during Federal control and by the President in conferences and negotiations conducted by him. It is deemed advisable to classify these representative organizations into groups with respect to the more or less analogous character of the services performed, aiming to have the nominees, as nearly as possible, representative of and conversant with the interests of all the classes of employees and employment. For the purpose of making and offering nominations as members of the labor group of the Labor Board the Commission pre-

scribes that these organizations of employees shall be grouped as follows:

Group 1: * * *

Group 2:

International Association of Machinists,

International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America,

International Brotherhood of Blacksmiths, Drop Forgers and Helpers,

Amalgamated Sheet Metal Workers, International Alliance,

Brotherhood Railway Carmen of America,

International Brotherhood of Electrical Workers.

Group 3: * * *

The great mass of railroad employers are members of or representeed through the organizations named above."

"Group 2," above enumerated, represents the mechanical section of the Railway Employees' Department of the American Federation of Labor, and the local organizations of the national unions herein enumerated who were employed on the Pennsylvania Road, constituted the Complainant System Federation No. 90.

On the 24th day of May, 1921, there were about 70,000 workers employed by the Pennsylvania Railroad Company in shop or mechanical work on its road. Of these 62,000 to 63,000 held membership in System Federation No. 90 (Record, pp. 129, 130).

Point I.

System Federation No. 90, at that time, had been in continued existence about three years, *i. e.*, since the 8th day of July, 1918 (Record, p. 120). It has a permanent dues-paying membership, a set of executive officers, and a regularly established office and machinery for dealing with the carriers, the United States Railway Administration and the Railroad Labor Board, in all matters affecting the interests of the shop craft employees on the Pennsylvania Railroad System (Record, pp. 127, 128), and during all that period it negotiated with the carriers and was recognized by the latter as the duly authorized representative of the shop craft employees (Record, pp. 133 to 137). It was distinctly an "organization of employees" within the meaning and intent of the Transportation Act and the defendants well knew that it was.

The decision of the Railroad Labor Board No. 119, rendered on the 14th day of April, 1921, specifically called upon the officers "and system organizations" of employees of each carrier to designate and authorize representatives to confer with the carriers. In the same decision the Railroad Labor Board laid down the following rules and regulations:

> "The right of railway employees to organize for lawful objects shall not be denied, interfered with or obstructed.
>
> The right of such lawful organization to act toward lawful objects *through representatives of its own choice*, whether employees of a particular

carrier or otherwise, shall be agreed to by management.

The right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed to by management. *This right of participation shall be deemed adequately complied with, if and when the representatives of a majority of the employees of each of the several classes directly affected shall have conferred with the management.*

The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice."

These directions likewise were in the nature of regulations made by the Railroad Labor Board "for the efficient execution of the functions vested in it" by the Transportation Act, and was binding upon the defendants.

When, therefore, on the 24th day of May, 1921, the officers of System Federation No. 90, duly authorized and designated by the latter for that purpose, met the representatives of the Pennsylvania Railroad Company, ready to confer with them about the then pending disputes as to rules and working conditions on the Road affecting the employees in shop and mechanical work, the Penn-

sylvania Railroad Company was under the duty imposed upon it by the language of Section 301 of the Transportation Act, as well as by the regulations of the Railroad Labor Board (Decision No. 119) to consider such disputes in conference with the said officers of System Federation No. 90, and in good faith to exert every reasonable effort to decide the pending dispute in order to avoid an interruption in the operation of the road. The Company evaded and flagrantly violated this duty by refusing to confer with System Federation No. 90. It is true the Transportation Act does not and cannot prescribe the extent of the discussion between the parties with respect to the pending disputes, but it does contemplate a *bona fide* effort to consider them on the merits with a view of arriving at a settlement, and if no adjustment is reached either because of the parties' inability to agree or an unwillingness to discuss on the part of either of them, Section 301 directs in mandatory language that such dispute "shall be referred by the parties hereto" to the Board of Adjustment or the Labor Board. In no event does the law tolerate a deadlock which might lead to interruption of operations.

When the officers of System Federation No. 90 appeared before the representatives of the Pennsylvania Railroad Company ready to discuss the pending dispute the latter took the position that they had no proof that System Federation No. 90 represented a majority of the shop craft employees on the Pennsylvania Road, and somewhat inconsistently at the same time announced in effect that they would ignore System Federation No. 90 and create a new and different system of employee

representation for the purpose of dealing with them under the Transportation Act and the decisions of the Railroad Labor Board.

All through the very interesting discussion between the representatives of the Company and System Federation No. 90 (Plaintiff's Exhibit No. 3, Record, pp. 307 to 403), the defendant Company and its officers recognized and assumed to act under the provisions of the Transportation Act and the regulations of the Railroad Labor Board, yet the scheme evolved by it and subsequently put into effect was in flagrant violation of the letter and spirit of both. If the Company actually doubted the authority of System Federation No. 90 to speak in behalf of its shop craft employees, although the organization represented fully 90% of all its employees and had theretofore uniformly acted on their behalf, it could require proof of such authority, and such proof could be furnished in the same manner as proof of any other existing fact. The Company did not need to call for a new expression of the desires of its employees in this respect. An examination of the membership records of System Federation No. 90 would have furnished sufficient proof as to the number of employees it represented.

After all the situation presented no novel feature and fell directly within the well established rule of agency. The Transportation Act directs the carrier and its employees to deal with each other in a certain manner. The carrier is a corporation—the employees represent a very large body of men. Both are acting through representatives or agents, and each has the right to appoint or designate its own agents and confer upon them such

authority as it chooses. Either party of course may question the authority of the alleged agent of the other party and call for proof of such agency, but neither party is at liberty to designate the agent of the other party or the manner of his choice.

But even if the Company was not satisfied with such proof and in good faith desired a new expression of its employees' choice of representatives, it would naturally have submitted to them a ballot in such form as would at least enable them to say whether or not they cared to continue entrusting System Federation No. 90 with their representation. The ballot, however, which the Company prepared and subsequently submitted to its employees was on the face thereof, so formulated as to exclude the possibility of a designation of System Federation No. 90, or its officers, as the representatives of the shop craft employees. By breaking up the body of employees into numerous and fractional organizations divided along local and craft lines and calling upon each of such newly created divisions to name three individual representatives, the Company made it impossible for its employees or the majority of them to act as a unit and to designate and authorize an organization of its own choice to confer with the carriers. Even in the absence of any decision by the Railroad Labor Board on that point, this procedure was a clear violation of the carrier's duty under Section 301 of the Transportation Act and an arbitrary and flagrant violation of the statutory rights of its employees under that section. Moreover the question was taken up by the Railroad Labor Board and the lat-

ter condemned the unlawful methods of the Company in unmistakable terms holding, among others, that

> "The carriers had no more right to undertake to assume control of the selection of the representatives of the employees than the employees would have had to supervise the naming of the representatives of the carrier, for the statute plainly provides that the employees shall 'designate and authorize' their representatives."

and prescribing the form and tenor of a ballot to be submitted to the shop craft employees of the Company (Bill of Complaint, Paragraph 44, admitted by the Forty-fourth paragraph of the Answer). It is admitted that the defendant wholly ignored and violated the said ruling of the Railroad Labor Board.

At this point it may again be stated that this action is not brought to enforce this ruling as a decision of the Railroad Labor Board. Decision No. 218 of the Railroad Labor Board is here adverted to first because it is an authoritative adjudication that the Company has violated the provisions of Section 301 of the Transportation Act. The Railroad Labor Board is in effect constituted by the Transportation Act a court of limited jurisdiction, and appellants contend that within the limited sphere of its jurisdiction its findings of fact are conclusive upon the questions adjudicated.

Decision No. 218, including the form of ballot prescribed therein, furthermore constitute a proper regulation made by the Board for the efficient execution of the functions vested in it, and as such is binding upon the parties and enforceable by process.

Point I.

In order that the Labor Board may be enabled to execute its functions, including the most vital function of establishing fair and reasonable wages and working rules, it must possess the power of establishing rules of procedure with respect to the formulation and manner of submission of the issues or disputes between parties, and the first and most indispensable requisite in that connection is to determine who are the proper or necessary parties to the dispute. On this precise point this Court in *Pennsylvania Railroad Company* v. *United States Labor Board, et al., supra*, has said:

> "It is urged that the question who may represent the employees as to their grievances, rules and working conditions under Section 301 is not within the jurisdiction of the Labor Board to decide that these representatives must be determined before the conferences are held under that section, that the jurisdiction of the Labor Board does not begin until after the conferences are held, and that the representatives who can make application under Section 307 to the Board are representatives engaged in the conference under Section 301. Such a construction would give either side an easy opportunity to defeat the operation of the act and to prevent the Labor Board from hearing any dispute. It would tend to make the act unworkable. If the Board has jurisdiction to hear representatives of the employees, it must of necessity have power to determine who are proper representatives of the employees. That is the condition precedent to its effective exercise of jurisdiction at all. One of

its special powers conferred by Section 308 is to 'make regulations necessary for the efficient execution of the functions vested in it by this title.' This must include the authority to determine who are proper representatives of the employees and to make reasonable rules for ascertaining the will of the employees in this matter."

The point is stated with even greater emphasis in the opinion of the Circuit Court of Appeals in the same case, as follows:

"It is urged for appellee that the matter of the election of representatives by the employees is wholly procdural and is something with which the Board is in no wise concerned, and its action in this regard was wholly beyond its jurisdiction. The force of the contention is not apparent. Title III confers on the Board important duties, and prescribes in Section 308 (4) that it 'May make regulations necessary for the efficient execution of the functions vested in it by this title.'

This, alone, if indeed in the very nature of things it were not necessarily so, would empower the Board to make provision for determining whether those purporting to represent disputants before the Board do in fact so represent them. If it is claimed that a pending dispute has been adjusted between the parties to it, it is very essential that the body before whom the dispute is pending assure itself of the authority to so dispose of the controversy of those who purport to act for the parties. This is especially true where one side of the dispute is a body of individuals such as employees of a great carrier."

Point I.

After refusing to recognize and confer with the legitimate and existing organization representing ninety per cent. of its shop craft employees and after denying such employees the opportunity and right to designate their own organization as their accredited representative, the Pennsylvania Railroad Company submitted its ballot above described to its shop craft employees, and System Federation No. 90 submitted another ballot to such employees inquiring whether they favored continued representation by the said Federation. Only 3,480 employees voted in favor of individual representation on the Company's ballot. Over 37,000 voted on the Federation ballot in favor of continued representation by System Federation No. 90. The defendants ignored the vote of the vast majority of its shop craft employees and continued in its refusal to deal with the organization thus again designated as the authorized representative of such employees. Instead it recognized the individuals, on its own showing chosen by no more than ten per cent. of such employees, and proceeded to make "agreements" with them establishing rules and working conditions in the shop craft works and to enforce such alleged agreements upon all employees in such work over the protest and against the express opposition of at least ninety per cent. of them. On the strength of this high-handed procedure, the defendant Company took the position that the disputes between it and its shop craft employees had been fully adjusted, and that there was no longer any dispute about which it was bound to confer with its employees, or which it should submit to the Railroad Labor Board or of which the employees could

bring before the Board or of which the Board could take cognizance on its own motion.

The Pennsylvania Railroad Company thus clearly evaded and violated the duty imposed upon it by Section 301 of the Transportation Act to consider a dispute between it and its employees in conference with designated and authorized representatives of the latter, to refer such dispute, if not decided in conference, to the Railroad Labor Board and to exert every reasonable effort to avoid an interruption to its operation growing out of such dispute. It also unlawfully frustrated the right of a *bona fide* organization of employees to secure a hearing on a dispute before the Railroad Labor Board under Section 307 of the Transportation Act, and the right and opportunity of the Board to receive such dispute for hearing on its own motion and to establish just and reasonable wages and working conditions under the provisions of the same section.

It also voiolated specific and lawful regulations of the Railroad Labor Board in the submission of its ballot to its shop craft employees and in assuming to make an agreement with a minority of its employees and attempting to impose the terms thereof upon all such employees.

The wrongs of the defendants thus complained of relate directly to the latter's violations of the main provisions of the Transportation Act as such and of necessary and reasonable regulations made by the Railroad Labor Board by authority of the Act. As stated above, the complainant's cause of action does not depend upon any decision of the Railroad Labor Board. The complainants do not ask the Court to direct the defendants to submit a ballot to their shop craft employees in the

form prescribed by Decision No. 218. They seek to enjoin the defendants from refusing to recognize and confer with the authorized representatives of their shop craft employees, from continuing to deal with persons not authorized or designated by such shop craft employees to represent them for the purposes of the Transportation Act, and from continuing to enforce upon their shop craft employees as a whole terms of an alleged agreement at best made with representatives of an admitted small minority, all in violation of the Transportation Act as such.

The appellants furthermore contend that the so-called "Decision" No. 218 of the Railroad Labor Board is not a decision within the meaning and intent of Title III of the Transportation Act, but merely a "regulation" or rule of procedure.

"Decisions" of the Railroad Labor Board, under the provisions of the Transportation Act, are only such as adjudicate disputes which threaten an interruption in the operation of the carrier. Such disputes are specifically defined in the Act and divided into two classes, those involving "grievances, rules or working conditions" which are cognizable by both Boards (Section 303) and "disputes with respect to the wages or salaries of employees or subordinate officials of carriers" cognizable by the Labor Board only.

Section 307, Subdivision (d), provides that "All the decisions of the Labor Board in respect to wages or salaries and of the Labor Board or an Adjustment Board in respect to working conditions of employees or subordinate officials of carriers shall establish rates of wages and salaries and standards of working conditions

which in the opinion of the Board are just and reasonable," and thereupon enumerated the tests upon which such justness and reasonableness should be determined. Sections 310 and 311 empower the Board to compel the attendance of witnesses and production of books, papers and documents in connection with its hearings, and Section 313 authorizes the Board in case it has reason to believe that any decision of the Labor Board or of an Adjustment Board is violated by any carrier, or employee or subordinate official, or organization thereof, to publish such violation.

The entire context of Title III of the Transportation Act makes it clear that the "decisions" of the Adjustment Boards and Labor Boards, which are thus made and left to the parties to accept or reject subject only to the penalty of adverse public comment by the Labor Board, refers to final decisions on disputes involving wages, grievances, rules and working conditions, made after a full hearing of all parties directly interested, and not to mere incidental orders or rules of procedure.

The decision in *Pennsylvania Railroad Company* v. *United States Labor Board*, *supra*, is not in conflict with the principles above contended for by the appellant. True the opinion in that case refers to Decisions No. 119 and No. 218 of the Railroad Labor Board as decisions "within the meaning of the Transportation Act" and characterize them as "not being compulsory." But this expression is in the nature of an *obiter dictum*. It was not necessary for the adjudication of the issues in that case, and the distinction between "decisions" of the Railroad Labor Board in the nature of final adjudica-

tions on the merits of disputes involving wages and working conditions and mere procedural regulations incidentally established by the Board by express statutory authority, was not presented to the Court nor passed upon in that case.

The main contentions of the appellants in the above case was that Section 301 of Title III of the Transportation Act conferred no jurisdiction whatsoever upon the Labor Board; that all that Section did was to impose a duty upon the carriers and their employees to confer whenever a dispute arose between them which was likely to lead to an interruption to the operation of the carrier. The appellant (Pennsylvania Railroad Company) further contended that the Railroad Labor Board had no authority to prescribe rules and principles governing conferences between carriers and their employees as it did by Decision No. 119, or to regulate the manner in which representatives of the employees should be designated as it did by Decision No. 218, and that if it was held that Title III conferred such powers upon the Railroad Labor Board then the enactment was unconstitutional and void. The Court in substance overruled these contentions of the Pennsylvania Railroad Company and held that the Railroad Labor Board had authority to decide the methods by which employee representatives should be designated for the purposes of the Transportation Act. For the purposes of this conclusion, it did not matter whether Decisions Nos. 119 and 218 were to be considered as "decisions" of the Railroad Labor Board not enforceable by process or as regulations of the Board made by statutory authority and enforceable by process.

Point I.

The appellants maintain that the latter is the correct position, but neither view of the particular point under discussion affects the cause of action herein. If Decision No. 218 is to be considered as not compulsory upon the Company, it merely means the Company was not bound to adopt the form of ballot prescribed by the Railroad Labor Board. That, however, does not relieve the Company from the duty of complying with the mandatory provisions of Section 301 of the Transportation Act, *i. e.*, the duty to confer in good faith with the properly authorized and designated representatives of its employees, and either to make an agreement with such *bona fide* representatives of such employees or, failing such agreement, to refer the dispute to the Railroad Labor Board and to permit the latter to make a decision on the same after a full hearing.

To hold otherwise would be to render the whole Labor Title of the Transportation Act absolutely meaningless. It would involve a holding that carriers and their employees cannot be forced by law to exert reasonable effort to avoid interruption to the operation of the carrier growing out of disputes between them, to consider such disputes and to refer to the Railroad Labor Board such issues as are not composed in conference, although Section 301 imposes such duties upon them in mandatory terms. It would imply that a mere semblance of a conference between the carrier and a few hand-picked employees would satisfy the requirements of the statute, although the latter specifically prescribed that the conferees be "representatives designated and authorized so to confer," and that any fiction of an agreement alleged

to have been made between the carrier and its employees would satisfy the requirements of the Transportation Act no matter how fraudulently contrived and no matter how strongly opposed by the main body of employees.

Under such a construction the carrier or the employees could ignore a complaint submitted by the other side to the Adjustment Board or the Railroad Labor Board if it felt like ignoring it and could with impunity violate any regulations of the Board.

The Railroad Labor Board created by the Transportation Act would thus be reduced to the status of a purely voluntary tribunal of arbitration even less effective than the Arbitration Boards under the earlier Railroad Statutes, whose decisions were made enforceable by law. A construction of this kind would have the practical effect of wiping out Title III of the Transportation Act from the statute books.

The ballots submitted by the Pennsylvania Railroad Company to its shop craft employees, and voted on by a small minority of such employees, as above recited, resulted in the "election" of about 828 individuals, designated as members of 276 separate shop craft committees within 46 distinct local divisions created by the Road and it was with the chairmen of such committees within each of the five main regions of the road that the alleged agreement between the Company and its shop craft employees establishing wages and working conditions, was made (Record, pp. 173 to 188). The Company continued operating under the terms of the said alleged agreement and dealing with the representatives alleged to have been designated on its ballots until July, 1923. It

held no elections among its employees until 1922. In 1923 the Company submitted to its shop craft employees ballots practically identical in form with those of 1921. It has ever since continued dealing with the alleged employee representatives chosen on such ballots and is operating under "agreements" alleged to have been made with them (Record, pp. 191 to 196). It is admitted that the Company has ever since the 24th day of May, 1921, refused to deal with System Federation No. 90 as a representative of its shop craft employees or with any other persons or organizations in their behalf except those designated on the Company's own ballots above mentioned. It is also admitted that the Company continue operating under the terms, as to wages and working conditions, of its said agreements with the alleged representatives of the shop craft employees chosen on its ballots. The violations of the Transportation Act above set forth have therefore been and still are continuous in character and the Company has definitely avowed its intention of continuing the same in the future.

POINT II.

The violations of the Transportation Act herein complained of were and are committed by agreement and co-operation between the defendants Pennsylvania Railroad Company, its officers defendants herein and by the other individual defendants, and the agreement and the defendants' action under the same, constitute a conspiracy.

While the defendants deny the charges of conspiracy as set forth in the Bill of Complaint, they specifically admit by Paragraph Thirtieth of their Answer that "*they* (defendants) refuse to recognize System Federation No. 90 and its Executive Council as representatives of the employees of the Pennsylvania Railroad Company."

The defendants also admit by paragraphs Thirty-fourth and Thirty-fifth of their Answer that "they (the defendants, including the officers of the Company) dealt with the representatives chosen on the ballot submitted by the Company and that they, the said officers, entered into agreements with the persons so chosen on the Company ballots fixing wages and working conditions for all shop craft employees of the Company."

It is furthermore admitted that the defendants T. H. Davis, W. J. Hilton, Charles Mode, J. E. Cavey and C. G. Larson hold themselves out as officers and representatives of the alleged organizations of employees created by the Company and assumed to act in behalf of such employees under the provisions of the Transportation Act (Bill of Complaint, Paragraph 2, Answer Second Paragraph).

Point II.

The defendants are thus admittedly acting in concert in all of the acts above complained of as violations of the Transportation Act, and if such acts are unlawful, as the appellants contend they are, then it follows that the defendants are united in a combination to do an unlawful thing, which in the eyes of the law constitutes a conspiracy.

> *Duplex Co.* v. *Deering*, 254 U. S. 443, 465;
> *Pettibone* v. *United States*, 148 U. S. 197, 203;
> *Davidson* v. *United States*, 274 F. 285, 287;
> *Alaska S. S Co.* v. *International Longshoremen's Assn.*, 236 Fed. 964, 969;
> *National Fireproofing Co.* v. *Mason Builders Assn.*, 169 Fed. 259, 264;
> *Goldfield Consol. Mines Co.* v. *Goldfield M. U. No. 220*, 159 Fed. 500, 517;
> *Hopkins* v. *Oxley Stave Co.*, 83 Fed. 912, 933;
> *Toledo A. A. & N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730, 739.

The unlawful acts on the part of the defendants not only constitute a common law conspiracy, but also a statutory offence in the nature of a conspiracy under the provisions of Section 19 of the Criminal Code, which reads as follows:

> "If two or more persons conspire to injure, oppress, threaten and intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States or because of his so having exercised the same, they shall be fined not more

than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office or place of honor, profit or trust created by the Constitution or laws of the United States."

The appellants contend that by the acts above complained of the defendants have injured and oppressed and threaten to continue injuring and oppressing the complainants in the free exercise and enjoyment of distinct rights and privileges secured to them by the laws of the United States, *i. e.*, the Transportation Act of 1920.

The principal rights and privileges secured to railroad employees under Title III of the Transportation Act are to have their grievances as to wages and working conditions heard by the Railroad Labor Board, determined upon the tests of fairness and reasonableness provided by the law and authoritatively and publicly adjudicated. The entire scheme of the alleged agreement between the Pennsylvania Railroad Company and the employee "representatives" chosen on its ballots was to frustrate that right and privilege: to deprive the employees of the right to submit such disputes to the Railroad Labor Board and to deprive the Board of an opportunity to pass upon such disputes.

The elaborate machinery arbitrarily established by the Company culminates in a so-called Joint Regional Board on which the carrier and employees are represented by equal numbers. It is this Board that is vested with the ultimate power of settling disputes

between the carrier and employees. The rules of the Joint Regional Board, devised by the company, call for a two-thirds vote of all members to carry any resolution or decision. Thus no decision can be made by the Board unless approved of by the carrier, and in the event of a disagreement between carrier and employees, the dispute remains unadjusted. No method is provided by the so-called rules of the Joint Regional Board for the disposition of any dispute on which the parties themselves fail to agree. This is fully admitted by the following testimony of Mr. Robert W. Massey, General Manager of the Pennsylvania Railroad Company:

> "Q. My question is, was there any provision for a final adjustment of such a dispute if the parties failed to agree upon a method of arbitration? A. Nothing specific.
>
> Q. Nothing in specific terms. Was it provided for in unspecific terms? A. I should say so; yes.
>
> Q. In what way? A. Just as I have stated, if you could not reach a decision at the second meeting of the reviewing committee, the matter then would be disposed of in a manner mutually agreeable to both the representatives of the employees and the representatives of the management.
>
> Q. And you assume in such a case that the employees and management would agree upon some method of disposing of it? A. Yes.
>
> Q. But no such method is provided? A. No.
>
> Q. In your organization? A. No."

POINT III.

The unlawful acts and conspiracy on the part of the defendants herein complained of violate the complainants' civil and statutory rights, and injure and oppress them in the free exercise and enjoyment of such rights.

The learned Circuit Court of Appeals on this point says:

> "It is evident that in enacting the Transportation Act of 1920, and, through it, affording means by which to prevent interruption of interstate commerce by labor disputes and strikes, the Congress had the public interest first in mind. It was more concerned in protecting the public than in conferring rights upon railroad employers and employees."

The protection of the public was undoubtedly the ultimate object and motive of Congress in enacting the Transportation Act, but the concrete methods which were set up by the Act for the attainment of that object were such as intended primarily to do away with the principal causes of friction between carriers and their employees by imposing upon each of them certain specific statutory duties intended to afford both parties an opportunity to compose their differences in conference or by arbitration, or in any event to secure a fair and impartial adjudication of the controversy on the merits and to lay the same before the public.

Title III of the Transportation Act was thus enacted for the benefit of the carriers and their employees as

well as the public. The methods and measures therein provided for the peaceful adjustment of disputes between employers and employees confer equal rights and duties upon both. Every duty imposed on the employees is by the same token a right of the employer, and conversely every duty imposed upon the employer becomes a right of the employees.

The shop craft employees of the Pennsylvania Railroad Company upon discharging the duties imposed upon them by the Transportation Act had the following definite statutory rights:

(1) To lay any disputes on the subject of wages and working conditions before the carrier, and to be met by the latter in conference in a *bona fide* effort to compose the dispute.

(2) To be represented in such conferences by representatives freely designated by themselves and authorized by them to confer.

(3) To refer any dispute not settled by agreement between them and the carrier to the Adjustment Board or the Labor Board as the case may be, either jointly with the carrier or upon their own application.

(4) To have a full and fair hearing on the issues in such dispute before such Board.

(5) To secure a decision on the merits of the dispute from such Board, and a public determination of the

Point III.

Board establishing fair and reasonable wages and working conditions in the manner prescribed by the Transportation Act.

On this point again it is respectfully submitted that the learned Circuit Court of Appeals erred when it held that Title III of the Transportation Act "did not disturb any of the rights which theretofore admittedly belonged to an interstate carrier and to its employees"; that "the carrier's right to deal with individual representatives of its employees remained. The right of employees, who are members of labor unions, to select their own conferences representatives and the right of their employer to restrict their selection to its own employees and exclude officers of labor unions was not abridged"; and again that "having power to decide a dispute which has either been submitted to it or of which it has taken control of its own motion, the Labor Board also has the power to decide beforehand who may properly represent the parties and to prescribe rules by which to ascertain their will in this regard. This power cannot be defeated by refusal of either party to obey its order. The action of the Labor Board by Decision No. 218 in finding the election of representatives by the Company's employees in the cases at bar void and prescribing a method and form of ballot for a new election was held by the Supreme Court to be within its power. *Pennsylvania Railroad Company* v. *Labor Board*, 261 U. S. 72, 83. *But this was the assertion of a right which the statute confers upon the Labor Board, not upon the parties to the dispute.* A right of employer or employees to insist that the other

proceed to a hearing pursuant to such rules as the Labor Board may have prescribed is not conferred upon either party to a dispute unless the statute makes it compulsory upon them" (italics are ours).

On the contrary, it is respectfully submitted that the whole object of Title III of the Transportation Act was to impose new duties upon both carriers and employees, *i. e.,* the duties to confer with each other and to submit disputes as to wages and working conditions for the decision and final adjudication of the Railroad Labor Board and that as above stated, each of such duties on the part of one of the parties were necessarily corresponding rights of the other party. The Railroad Labor Board as such has neither interests nor rights in connection with disputes between carriers and employees. It has certain powers to compose or adjudicate such differences. Whatever may have been the ultimate aim or motive of Congress in enacting Title III of the Transportation Act, it hardly can be questioned that its direct effect was to confer the rights above enumerated to the employees as new rights.

Each of these important rights and privileges conferred upon the employees by the Transportation Act has been violated by the defendants.

The defendants have denied the complainants the opportunity, privilege and right to confer with them on the dispute as to rules and working conditions, which was pending on the 24th day of May, 1921, and still remains undetermined; they have denied the complainants the right to designate by their own free choice representatives to confer with the carrier; they have

frustrated and destroyed the complainants' statutory right to refer the dispute to the Railroad Labor Board by entering into an alleged agreement with a small group of employees represented by spokesmen of the Company's own choice, and on the strength of such spurious "agreement" have taken the position that the dispute between them and their shop craft employees had been settled and decided and that there was therefore no issue referable to the Board; they have prevented the Railroad Labor Board from performing its statutory duty to decide the dispute and to establish fair and reasonable rules and working conditions by the same device.

On the undisputed facts in the record, the defendants have openly, almost boastfully, deprived their shop craft employees of all the rights and privileges conferred upon them by the Transportation Act and are still continuing to violate such rights.

POINT IV.

The complainants have sustained and are sustaining pecuniary losses and other damages by reason of the defendants' unlawful acts for which they have no adequate remedy at law.

The Bill of Complaint by Paragraph 53 thereof avers that by reason of the unlawful acts on the part of the defendants, above recited, "numerous members of System

Point IV.

Federation No. 90 have become detached from membership in the said System, its income from dues and per capita taxes is being reduced, its funds are dissipated and its functions, usefulness and very existence are seriously jeopardized." On the trial, Newton P. Good, President of System Federation No. 90, and one of the complainants herein, testified that owing to the acts complained of on the part of the defendants, the membership of the Federation had been reduced from approximately 60,000 in May, 1921, to about 45,000 in July, 1922, and that from the last mentioned date the organization had collected practically no dues or per capita taxes, particularly in view of the fact that such acts had forced a large portion of its membership into a strike (Record, pp. 138, 139, 153 and 154).

But even more substantial damage was sustained by individual members of System Federation No. 90 in whose behalf this action is also brought.

It is alleged in the Bill of Complaint and was established at the trial without contradiction, that the wages introduced by the defendants as a result of their alleged agreement with the representatives of the minority employees chosen on the Company ballots, resulted in many instances in substantial reductions from those prevailing before the making of such alleged agreements and from those established by the Railroad Labor Board and prevailing on all other roads (Record, pp. 219 to 222, 230 to 234, 246 to 249).

That the complainants have sustained and are sustaining money damages by reason of the defendants' acts has furthermore been found as a fact by the trial

Court as evidenced from the following excerpt from its opinion:

> "In order to have the full position of the plaintiffs before us, it should be further stated that there is a money difference, as well as other differences of value to the employees, between what they get under these agreements, on which the Company stands but which the plaintiffs repudiate as frauds and pretenses, and what the employees would presumedly otherwise receive. As an illustration of one difference, figures may be taken which, although perhaps not mathematically accurate, may be accepted to present the point. Under the railroad administration a craftsman was paid at the rate of eighty-five cents an hour. Thereafter the carriers, by an application to the Labor Board, had it reduced to seventy-two cents. Under the agreements on which the Company stands, there was a further reduction to sixty-eight cents" (Record, p. 264).

Money damages of a different nature were sustained and are sought to be recovered herein by other classes of the defendants' shop craft employees. The record discloses that during the acute stage of the controversy between the parties hereto, in May and June, 1921, almost one-half of the mechanical force of the Pennsylvania Railroad Company had been temporarily laid off or "furloughed." The employees thus "furloughed" were entitled to re-employment in the order of their seniority in service upon an increase in the working forces. Shortly thereafter the Company did increase such

working force, but refused to re-employ the furloughed members of System Federation No. 90 unless they consented in writing to the terms of the alleged agreement with the representatives chosen on the Company ballots. Several thousand of such employees refused to sign such agreements and were not re-employed. Other employees, who were not furloughed, were likewise requested to sign such consents, and discharged for their refusal to do so. The employees thus refused re-employment or discharged have sustained damages through loss of wages.

The shop craft employees of the defendant Company remaining at work furthermore sustained substantial damage incapable of computation or ascertainment and such as cannot be compensated by a money judgment. Such wages arise mainly from the inferior working conditions established by the "company agreement" under which they are forced to work. The abolition of the seniority rights established by the National Agreement is one instance in point. The seniority right secures to the employee a tolerably safe tenure of his job so long as he performs his duties faithfully and properly. In the absence of such an arrangement the employee's term of employment is left entirely to the arbitrary decision or whim of the Company official. Under the National Agreement an employee claiming to have been unjustly discharged had a right to a hearing and to a reinstatement with pay if his complaint was found justified. This was likewise abolished by the Company agreement. Other instances of deteriorated working conditions introduced by the Company

through its said alleged agreement are the re-introduction of the "piece work system," which the employees felt was a hardship, and numerous reductions in the grades of employment.

It does not call for a lengthy argument or citation of authorities to convince the Court that a Court of Law can offer no remedy for damages of this character.

On this point, the opinion of the trial Court states:

> "Another ground (of the motion to dismiss) is that the plaintiffs have an adequate remedy at law. The motion, so far as concerns this ground, is likewise denied, with the allowance of a further exception to defendants. The reasons for the ruling are too obvious to require statement" (Record, p. 255).

POINT V.

The complainants herein are proper parties to maintain this suit.

The party complainants are the Pennsylvania Railroad Company and Allied Lines Federation No. 90, which, on the uncontradicted proof herein, represented about 63,000 out of a total of 70,000 of the defendants' shop craft employees at the inception of the present controversy, May, 1921; about 45,000 of such employees in the reduced total of shop craft workers on the road, in July, 1922, and still represents substantially that number. System Federation No. 90 sues in behalf of itself and in

behalf of all its said members. It brings this action in its own name and also by the officers and members of the Executive Council of the organization, each of whom is an employee of the Pennsylvania Railroad Company and sues herein individually as well as officially.

The different classes of the defendants' shop craft employees adversely affected by specific unlawful acts of the defendants join in the suit through individual representatives of their respective classes, each of whom brings this action in behalf of himself and all other employees of the said Company similarly situated.

On this point the Court below said:

> "The grounds advanced by defendants to support a decree of dismissal are many, some of which may be disposed of without discussion, leaving the main ground to be treated more at large. One ground is that these plaintiffs have no right to maintain this Bill as a representative or class Bill. The dismissal of the Bill on this ground is refused. The same, or a substantially like ground, was urged in the case of *Fenstemacher* v. *R. R. Co.* (unreported), and found to be untenable. To that ruling we adhere, with exception allowed to defendants" (Record, pp. 254-255).

Under the equity rules and the numerous and uniform adjudications on the subject, the Court could not have held otherwise. Equity Rule 37 provides in part:

> "All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs * * *."

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Equity Rule 38 provides:

> "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

The principles laid down in Rules 37 and 38 are elucidated and discussed by Mr. Justice Lamar in *Brown v. Guarantee Trust Co.*, 128 U. S. 403, in this illuminating language:

> "It is not indispensable that all the parties should have an interest in all the matters contained in the suit, but it is sufficient if each party has an interest in some material matters involved in the suit, and they are connected with the others. Moreover, if all the parties plaintiff to a suit have a common interest in the subject matter of the litigation, it is not necessary that they should all be interested to the same extent. * * * If the object of the suit be single, but it happens that different persons have separate interests in distinct questions that arise out of that single object, such persons should be brought before the court in order that the suit may conclude the whole object. Similarly, a bill cannot be considered multifarious by reason of the fact that it asks for some additional relief incidental or contributory to the complete solution of the whole controversy and to the proper adjudication of the rights of the respective parties in regard to the principal subject-matter of the suit, there being no inconsistency

between the different sorts of relief asked for. * * *"

Similarly the doctrine is stated in *Corpus Juris* as follows:

> "Where the requisite community of interest exists, it is immaterial that plaintiffs are interested in different degrees and to an unequal extent. Several plaintiffs may join, although their interests are separate, where the relief sought by each involves the same question, requires the same evidence, and leads to the same decree" (21 *C. J.* 309).

Minnesota v. *Northern Securities Co.*, 184 U. S. 199;
Gregory v. *Stetson*, 133 U. S. 579;
Commodous Point Terminal Co. v. *Hudnall*, 283 Fed., 150;
Van Wagenern v. *Reed, et al.*, 287 Fed. 148;
Curran, et al. v. *Campion, et al.*, 85 Fed. 67;
Jones v. *Missouri Edison Electric Co.*, 144 Fed. 765;
Williams v. *Crabb*, 117 Fed. 193.

Nor is the complainants' right to maintain this suit impaired by the fact that a large number of members of System Federation No. 90 are at this time on "strike" against the defendant Company. On this subject the Bill of Complaint avers that the members of System Federation No. 90 continued at work so long as there was any hope or expectation of the Company abandoning its lawless policy above described, but when the Company

expressed a fixed determination to continue and perpetuate its unlawful plan and scheme to evade the provisions of the Transportation Act and the decisions of the Railroad Labor Board, System Federation No. 90 submitted the following question to a referendum vote of its members, to-wit:

> "In the event the Pennsylvania Railroad System refuses to comply with Decision No. 218 of the United States Railroad Labor Board, shall a strike be authorized on a day to be later set?"

The question was answered in the affirmative by an overwhelming majority of the members, and thereafter on July 1st, 1922, System Federation No. 90 authorized its members to cease working for the Company until the latter would comply with the provisions of the Transportation Act and the lawful decisions of the Railroad Labor Board.

About 30,000 to 33,000 members of the Federation took advantage of such authorization and went on strike, while about 12,000 Federation members remained at work (Bill of Complaint, Paragraphs 47 and 48. Answer, Forty-seventh and Forty-eighth Paragraphs. Testimony of Newton P. Good, Record, p. 138).

It will thus be noted:

(1) That by the language of the resolution adopted, the strike was not peremptorily ordered but merely authorized.

(2) That while a majority of the members of System

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Federation No. 90 went on strike, a substantial portion of them remained at work, and this action is brought in behalf of both classes.

(3) That a strike was based solely upon the refusal of the Pennsylvania Railroad Company to comply with "Decision No. 218" of the United States Labor Board; that its object was to enforce compliance on the part of the Company with the said ruling of the Labor Board, and with the provisions of the Transportation Act; that the striking employees held themselves in readiness at all times to resume their work as soon as the Company would accord them their statutory rights under the Transportation Act, and on repeated occasions so informed the defendant Company.

The appellants contend that under the circumstances the relation of employer and employees subsisting between the parties was not terminated by the strike. It was only temporarily suspended with respect to such employees as went on strike. The rule is stated in the Ruling Case Law (16 R. C. L., 435) in the following language:

> "A strike is, however, ordinarily not intended to be a complete severance of relation between the employees and the employer, but simply a means of enforcing compliance with a demand made on the employer. By withdrawing temporarily from the service, the employees seek to induce the employer to acquiesce in their demands and to reinstate them in the service under the conditions that they seek to impose. Although they cease to

work, the employees intend to retain their positions. In fact a strike is frequently defined as a cessation of work by a body of workmen as a means of enforcing compliance with a demand made on their employer. *Arthur* v. *Oakes*, 63 Fed. 310; *Kemp* v. *Division No. 241, Amalgamated Assn. of St., Etc., Ry.*, 255 Ill. 213."

In his concurring opinion in *Iron Moulders' Union* v. *Allis-Chalmers Co.*, 166 Fed. Rep. 45, at page 52, Judge Grosscup discusses the precise point and reaches the following conclusions:

> "A strike is cessation of work by employees in an effort to get for the employees more desirable terms. A lockout is a cessation of the furnishing of work to employees in an effort to get for the employer more desirable terms. *Neither strike nor lockout completely terminates, when this is its purpose, the relationship between the parties.* The employees who remain to take part in the strike or weather the lockout do so that they may be ready to go to work again on terms to which they shall agree—the employer remaining ready to take them back on terms to which he shall agree. Manifestly, then, pending a strike or lockout, and as to those who have not finally and in good faith abandoned it, a relationship exists between employer and employee that is neither that of the general relation of employer and employee, nor again that of employer looking among strangers for employees, or employees seeking from strangers employment * * *."

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A similar view is expressed in *Farmers' Loan & Trust Co.* v. *Northern Pac. R. R. Co.*, 60 Fed. 803. The Court after considering the various definitions of the word "strike," says (p. 819):

> "Whichever definition may be preferred—and possibly no one of them is precisely accurate,—there are running through all of them two controlling ideas: First, by compulsion to extract from the employer the concession demanded; second, a cessation of labor, but not the abandonment of employment. The stoppage of work is designed to be temporary, continuing only until the accomplishment of the design and upon its accomplishment the resumption of employment. *The cessation of labor is not a bona fide dissolution of contractual relations and an abandonment of the employment, but is designed as a means of coercion to accomplish the desired result.*"

In *Tri-City Central Trades Council, et al.* v. *American Steel Foundries*, 238 Fed. 728, 151 C. C. A. 578, construing the Clayton Act, the Circuit Court of Appeals, Seventh Circuit, holds:

> "A labor union, of which former employees engaged in a strike were members, is not a mere intermeddler, whose interference with other employees may be restrained, when only lawful means are used, since a strike does not fully terminate the relationship between the parties, but creates a relationship neither that of general employer and employee, nor employers and employees seeking work for them as strangers."

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In *Greenfield* v. *Central Labor Council of Portland and Vicinity, et al.,* 192 Pac. 783, the precise point under discussion was passed upon by the Court in the following unmistakable language:

> "Because a strike was declared and the union employees walked out, plaintiff claims that the relation of employer and employee ceased to exist, that there was no longer 'any dispute concerning terms or conditions of employment,' wherefore Chapter 346, Laws 1919, would not apply. Counsel have not cited, and we have not found, any authority which sustains that contention, and where that question has been decided the authorities are against it. On this point, Section 20 of the Clayton Act, 38 Stat. at L. (U. S. Comp. Stat., Sec. 1243d) is identical with Section 2 of Chapter 346, Laws 1919."

The rule above discussed is interesting by an application of the general principal of law in the construction of contracts that when the obligation of performance by one party presupposes a corresponding obligation on the part of the other, the neglect or refusal to perform by one of the contracting parties dispenses with the obligation of performance by the other, and of the further rule that in case of such breach of contract, the aggrieved party may treat the rescinded contract as still in force while the party breaching the contract does not have that privilege.

Roehm v. *Horst,* 178 U. S. 1;
O'Neil v. *Supreme Council Am. L. of Honor,* 70 N. J. L. 410;

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J. W. Brennan Construction Co. v. *State*, 191 N. Y. S. 253;
Fulton v. *Canno*, 192 N. Y. S. 804.

In any event, however, the question is not determining upon the right of complainants to maintain this suit. It appears without contradiction that between July 1, 1921, when the alleged agreement between the Company and the "representatives" of employees chosen on its ballot went into effect and July 1, 1922, when the strike was declared, all members of System Federation No. 90, complainants herein, were compelled to operate under the terms of such alleged agreement and to accept the reduced wages fixed thereby. They are thus entitled to recover the difference between the wages due them and the wages paid them during the period of one year entirely regardless of the question whether the strike subsequently terminated their status of employees of the Company.

Besides, as above stated, this action is brought not only on behalf of the Company's striking employees but also on behalf of a large number of its employees who did not go on strike but had continued working for the Company to this date.

POINT VI.

The complainants are entitled to the injunctive relief prayed for herein.

The complainants herein ask for a decree in substance enjoining and restraining the defendants from continuing the following acts and conduct:

(1) From enforcing such provisions as to wages and working conditions in the defendants' alleged agreement with the "representatives" chosen on the company ballots as established inferior conditions with respect to wages and working rules to those in force and effect on June 30, 1921;

(2) From continuing to deal or contract with such alleged representatives as representatives of the shop craft employees of the company designated and authorized by them to confer with the carrier under the provisions of the Transportation Act;

(3) From financing, supporting and controlling the alleged organizations of the company's shop craft employees and from interfering with such shop craft employees in the free choice of their representatives for the purposes of the Transportation Act;

(4) From refusing to recognize System Federation No. 90 as the representative of the company's shop craft employees duly designated and authorized to confer and act in their behalf for the purposes of the Transportation Act;

(5) To enjoin the defendants T. H. David, W. J. Hilton, Charles Mode, J. E. Cavey and C. G. Larson from acting and holding themselves out as representatives of the company's shop craft employees duly designated and authorized by the latter to confer and contract with the defendants under the terms of the Transportation Act.

The complainants' right to each and all forms of the injunctive relief above set forth follows logically and inevitably from the theory, above discussed, that all the acts so sought to be enjoined are in violation of the positive commands of the Transportation Act, and therefore unlawful; that such unlawful acts are continuous and the defendants threaten to persist in them; that by reason of such acts, the complainants have sustained and are sustaining pecuniary and other damages for which there is no adequate remedy at law.

POINT VII.

The complainants herein are entitled to money damages and to a decree ordering that an accounting be taken of such damages.

Upon this branch of the case the undisputed facts are as follows: At the date of the enactment of the Transportation Act, March 1, 1920, the wages of all classes of railroad employees were definitely fixed by the national agreement.

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The Transportation Act by Section 312 provided that

> "Prior to September 1, 1920, each carrier shall pay to each employee or subordinate official thereof wages or salary at a rate not less than that fixed by the decision of any agency, or railway board of adjustment in connection therewith, established for executing the powers granted the President under the Federal Control Act, in effect in respect to such employee or subordinate official immediately preceding 12.01 A. M., March 1, 1920."

At the time of the enactment of the Transportation Act a general wage dispute was pending between the carriers and their employees, including the parties hereto, and the act provided for methods of adjusting such disputes and all futures wage disputes between the carriers and their employees. Under these terms, wages may be re-adjusted in one of the following three ways:

(1) By a voluntary agreement between the parties reached in conference between representatives of the carrier and representatives of the employees designated and authorized by them for that purpose (Sec. 301 of the Transportation Act);

(2) By the mutual acceptance of a decision of the Railroad Labor Board on a wage dispute rendered after a full hearing of all parties directly concerned and establishing fair and reasonable wages in the light of the tests specified by the Act (Sec. 307 of the Transportation Act);

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(3) By the sole action of the carrier after, but not before; rejecting a decision of the Railroad Labor Board as above set forth or by the sole action of the employees in forcing a wage rate upon the carrier different from the one established by the Board but likewise after such decision has been rendered and rejected (Sec. 313 of the Transportation Act, *Pennsylvania R. R. Co.* v. *U. S. Labor Board, supra*).

This status with respect to existing wages and working rules on the Pennsylvania R. R. System was not only a matter of express legal enactment but also based upon agreement between the parties. Through their mutual dealings, the parties hereto, the Pennsylvania R. R. Co. as well as its shop craft employees assumed and assured each other that they would carry out the provisions of the Transportation Act and abide by the decisions of the Railroad Labor Board. It is worthy of note in this connection that the Pennsylvania R. R. Co. throughout the dispute which led up to this action never frankly took the position of rejecting any ruling or decision of the Railroad Labor Board, but on the contrary at all times maintained that it accepted and acted upon such decisions, except that it placed its own construction on them. Throughout the conference with representatives of System Federation No. 90 on May 24, 1921 (Plaintiff's Exhibit No. 3, Record, pp. 307-402), Mr. R. V. Massey, the authorized spokesman of the defendant company, stoutly maintained that the ballots prepared by the company for submission to the shop craft employees were strictly in accordance with decision No. 119 of the Railroad Labor Board, and that position was consist-

ently adhered to by the company in all subsequent discussions on the subject.

When the Railroad Labor Board by decision No. 2 rendered July 20, 1920, increased the wages of railroad employees, including those of the shop craft workers, both sides accepted the said decision and the defendant company paid the increased rates. On the other hand, when the said Board by decision No. 47, rendered on the 1st day of June, 1921, reduced the wages of such employees 8 cents per hour, both sides again accepted the decision and the employees continued working at the reduced wage.

Some time in the month of August, 1920, the complainants were informed that the defendant company intended to change the prevailing rules and working conditions without resorting to the methods provided by the Transportation Act. The complainant N. P. Good in behalf of System Federation No. 90 and the members of the same, wired to each general manager of the company inquiring whether such information was true and adding that if it were, the employees would consider it a violation of the existing agreement and the decisions of the Labor Board, and suspend work. To this the said Managers of the defendant company by letters of uniform tenor replied as follows:

> "Dear Sir:
>
> Your telegram of August 30th:
>
> Doubtless you are aware of the fact that the railroad representatives advised the United States Railroad Labor Board that the railroads would

comply with the decision of that Board in regards to working conditions, pending a hearing on the subject to be held by the Board at an early date.

Decision No. 2 of the United States Railroad Labor Board provides that pending the presentation for consideration and determination of the question pertaining to the continuation and modification of such rules, conditions and agreements, no changes shall be made except by agreement between the carrier and employees concerned.

We do not contemplate any changes pending the decision of the United States Railroad Labor Board unless, in the meantime, our officers and such employees as may be concerned, may, by agreement, desire to do so.

Yours truly,

.....

General Manager."

(Bill of Complaint, Paragraphs 23 and 24, Answer Twenty-third and Twenty-fourth Paragraphs).

It was on this unequivocal statement and representation on the part of the defendant company that it would make no changes pending the decision of the Railroad Labor Board except by agreement with its employees that the members of System Federation No. 90 remained at work.

The wages established and prevailing on the date of the enactment of the Transportation Act, and as modified by the two succeeding decisions of the Railroad Labor Board above mentioned, must thus be considered to have

remained in full force and effect as a matter of law and contract unless they were modified by one of the three methods above enumerated.

The undisputed fact is that after Decision No. 147 of June 1, 1921, the Railroad Labor Board has at no time rendered any decision upon the disputes between defendant company and its shop craft employees or attempted to establish fair and reasonable wages for such employees. The wage reductions proven to have been made by the company after the said date can therefore not be justified either on the theory of the Railroad Board's sanction or on the theory of the company's right to fix wages arbitrarily after rejecting a decision of the Board. If such wage reductions can be upheld at all, it can only be on the theory that they were established by voluntary agreement between the carrier and the shop craft employees arrived at in conference as prescribed by Sec. 301 of the Transportation Act.

This in fact is the position taken by the defendant company. Throughout the answer to the bill of complaint herein and throughout the trial, the company maintains and maintained that the alleged agreement made between it and the representatives chosen on its ballot was a valid agreement, that it satisfied all requirements of the Transportation Act and that the terms provided therein were binding upon all of its shop craft employees.

The validity or invalidity of the alleged agreement between the company and the representatives of shop craft employees chosen on its ballot is therefore determining on the question raised under this point.

Point VII.

The appellants maintain that the alleged agreement entirely failed to meet the requirements of the Transportation Act; that it was conceived and executed as a trick and device to evade the law; that it was fraudulent, null and void and had and has no binding effect upon any employee other than the signatories themselves.

The agreements between the carriers and employees which the Transportation Act considers as deciding a dispute between the parties so as to preclude the interposition of the Labor Board upon the application of either party or on its own motion, are agreements described in Section 301 of the Transportation Act, *i. e.*, agreement arrived at between representatives of the carrier and representatives of its employees, designated and authorized by the latter to confer, after consideration of such dispute in conference. As mentioned above this requirement by inevitable inference of law implies among other things (1) the free and voluntary act, (2) of all or at least the substantial majority of the employees directly interested in the dispute, (3) acting through representatives freely designated by them for that purpose.

It appears without contradiction that the shop craft employees of the Pennsylvania Railroad, to the extent of about 90% of their total number, were members of System Federation No. 90; and that the company refused to deal with that organization; that upon a vote taken among such employees to designate their representatives to confer with the carrier, only 3,480 voted on the company ballots providing for scattered and divided individual representation while 37,238 voted in

favor of representation by System Federation No. 90 and that the company disregarded the vast majority of its shop craft employees and proceeded to deal and contract with an avowedly insignificant minority; that the company did and does impose that "agreement" upon all of its shop craft employees in the face of the specific ruling of the Railroad Labor Board that the provision for conferences contained in the Transportation Act shall be deemed equitably complied with only "after and when the representatives of a majority of the employees of each of the several classes directly affected shall have conferred with the management"; that the vast majority of the shop craft employees not only did not acquiesce in the alleged agreement made by the unauthorized minority representatives but expressly protested against such terms and declared that they would not be bound by it.

The alleged agreement is furthermore vitiated for another conclusive reason. It is admitted that the alleged organization of shop craft employees with whom the company contracted was not only created upon a plan contrived by the company itself but that it was and is being maintained at the expense of the company. The said alleged organization as a matter of fact has no real existence or function. It has no dues-paying membership or revenues of any kind. The company prepares its literature and prints and distributes the same at its own expense, it pays the office rents and pays the salaries and expenses of the alleged officers and representatives of the alleged organization. In all conferences to consider disputes between the carrier and its

employees, both sides, the representatives of the carrier as well as the alleged representatives of the employees are equally in the pay of the company and dependent upon it, although the interests and contentions of the two sides to such disputes of necessity must be divergent, even antagonistic. It is an elementary rule of law that the agent must look for compensation to his principal and not to the otherside and that all agreements made by agents who are paid by and owe their position and allegiance to the other side are inoperative and void for fraud.

The agreement alleged to have been made between the defendant company and the unauthorized representative of its minority employees thus has no legal existence and effect and consequently the agreement between the parties in force prior to July 1, 1921, and created by law and by the voluntary consent of the parties is still in full force and effect and determines the wages to which the shop craft employees were entitled ever since that date.

The fact that such employees accepted wages at the lower rate does not constitute a waiver in law and does not estop them from recovering the full amount.

This rule applies to all cases where wages are fixed directly or indirectly by statutory or other legal authority.

100 Wash. 642

In *Larson* v. *Ries*, 171 Pac. R. 1037, the action was to recover the difference between a minimum wage rate established by a commission under statutory authority and the lower wage actually paid by the employer. The

Court held that the plaintiff could recover in spite of the fact that she had voluntarily accepted the lower rate.

In *State* v. *Benn*, 69 So. W. Rep. 484, the Court held that the laborer cannot contract away or waive any benefits conferred upon him by statute. 95 Mo. app. 516

A case directly in point is that of *Rodes* v. *New Orleans Gt. No. R. R. Co.*, decided by the Supreme Court of Mississippi in April, 1922 (91 So. 281). 129 Miss. 78

The facts in the case as stated in the opinion were as follows:

> The appellant Ed. Rodes, was the plaintiff in the Court below, and filed suit in the Circuit Court against the appellee, alleging that the appellee is a common carrier, and that for several years past the appellant has been employed as a section laborer, or track laborer, in maintaining its railroad tracks, and that appellant was so employed continuously between January 1, 1921, and June 30, 1921. It is further alleged that the rate of pay of all laborers on said railroad was fixed by the United States Railroad Labor Board on July 20, 1920, at the sum of 36½ cents per hour, and that the fixing of said rates was in all respects legal and just and was authorized by the act of Congress commonly known as the Transportation Act of 1920 (41 Stat. 456), and that the railroad company was bound thereby, and was compelled under the law to recognize the same, and to pay the appellant according to said

rate fixed by said board and that the railway company did recognize the legality thereof, and did pay the plaintiff according to the same up to January 1, 1921, and since said date has failed to pay the plaintiff according to said rates; that said rates of pay fixed by said board remained unchanged continuously from July 20, 1920, to June 30, 1921, and that between these dates of January 1, 1921, and June 30, 1921, appellant worked for the appellee in the capacity aforesaid a total of 1,449 hours, for which labor he was entitled to receive 36½ cents per hour under the decision of said Labor Board, but that he had only been paid 20 cents per hour for said time, leaving due him by the appellee the sum of $239.08 which is past due, owing and unpaid, and which the appellee withholds and refuses to pay to plaintiff's damage, etc.

The Court upheld the plaintiff's right to recover, saying in part:

> "The legal effect of the action of the board is to fix for the time being (a temporary period) the wages and salaries of the employees until the parties can agree upon such wages or salaries, or can make other arrangements with other men for the carrying on of the business of the carrier. *It has the effect, in our opinion, of giving a right of action against the carrier by the employee or official for the salary so fixed under the provisions of the act if services are performed thereunder, and the courts are open for the enforcement of this obligation.*"

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The rule is analogous to that which governs the right of public officers and civil service employees whose salaries are directly or indirectly fixed by law.

The general rule applicable to such cases is stated in R. C. L. (Vol. 22, p. 538) as follows:

> "As a general rule an agreement by a public officer to render the services required of him for less than the compensation provided by law is void as against public policy. * * * Even the actual receipt of less than the legal rate of compensation for the services rendered by a public officer does not estop him from recovering the full amount which may by law be due to him."

Similarly in 29 *Cyc.* 1429:

> "If an officer accepts an office whose compensation it has been attempted illegally to reduce, and receives the compensation at a reduced rate, he is not estopped from claiming the balance as fixed by law."

See also:

Goldsborough v. *U. S.*, Taney, 80;
Glovey v. *U. S.*, 180 U. S. 595;
Gallaher v. *Lincoln*, 63 Neb. 339, 88 N. W. 505;
Nelson v. *Superior*, 109 Wis. 618, 85 N. W. 412;
Kehn v. *State*, 93 N. Y. 291;
Clark v. *The State*, 142 N. Y. 101.

POINT VIII.

For all the reasons above set forth the decree of the Circuit Court of Appeals should be reversed with costs.

December 12, 1924.

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